

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
BellSouth Emergency Petition)	WC Docket No. 04-245
For Declaratory Ruling and Preemption)	
of State Action)	

**SBC'S REPLY COMMENTS
IN SUPPORT OF BELL SOUTH'S PETITION**

The comments in this proceeding defending the Tennessee Regulatory Authority's decision to regulate the rates of § 271 competitive checklist items highlight the efforts of CLECs throughout the country to encourage states to engage in similar arrogations of authority. The comments thus confirm the need for immediate Commission action. As Verizon said in its Comments, "[t]he decision of the Tennessee Regulatory ("TRA") that forms the basis for BellSouth's petition is no isolated incident. Instead it is part of a systematic and nationwide effort by CLECs to reimpose the discredited regime of maximum unbundling by relying on section 271[.]"¹

Verizon's description applies with equal force to the campaigns being waged by CLECs in states served by SBC. In Kansas, for instance, Covad told the Kansas State Corporation Commission that it "has the authority to enforce the unbundling requirements of Section 271 of the federal Telecommunications Act."² Similarly, Covad argued before the Indiana Utility Regulatory Commission:

¹ *Verizon Comments* at 1.

² In the Matter of the General Investigation to Implement the State Mandates of the Federal Communications Commission's Triennial Review Order, *Covad's Response to Commission Order and Comments on the Effect of the FCC's Triennial Review Order*, State Corporation Commission of the State of Kansas Docket No. 03-GIMT-1063-GIT at 20 (Sept. 19, 2003). Attachment A. A month later Covad made the same pronouncement in a Kansas UNE rate proceeding. See In the Matter of the General Investigation to Determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning and Line Sharing, *Covad's Response to*

The BOCs are obligated to provide CLECs with the specified network elements independent of Section 251, pursuant to Section 271, and thus the Commission has the obligation and authority to set the cost-based rate for such access pursuant to Sections 201 and 202 of the Communications Act.³

And, most recently, in Texas, AT&T and “the CLEC coalition” informed the Public Utility of Texas that the Act:

. . . does not give the FCC exclusive jurisdiction over § 271 proceedings, nor has the FCC asserted such jurisdiction. Rather, in its § 271 proceedings, the FCC has stressed the important role state commissions are expected to play in ensuring compliance with § 271 standards after a BOC has been granted interLATA entry. The [Texas Public Utility Commission] has full authority to arbitrate all of the issues set out in the parties’ DPLs involving CLECs [sic] access to and use of network elements SBC is required to provide under § 271 of the Act.⁴

The upshot of all these efforts is a concerted effort by CLECs to maintain in perpetuity “the widest unbundling possible,”⁵ and, in particular, UNE-P, at below cost rates by doing an end-run around the Commission’s § 251 unbundling decisions. But the Act is clear that states have no authority to regulate the rates, terms, or conditions under which Bell Operating Companies (“BOCs”) provide items required by the § 271 competitive checklist. The authority to do so resides solely with the Commission, and the Commission should act promptly and definitively to defend that authority.⁶

Commission Order 21 Soliciting a Brief on the Effect of the FCC’s Triennial Review Order, State Corporation Commission of the State of Kansas Docket No. 03-GIMT-032-GIT at 17 (Oct. 8, 2003). Attachment B.

³ In the Matter of the Indiana Utility Regulatory Commission’s Investigation of Matters Related to the Federal Communications Commission’s Report and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147, *Covad Communications Company’s Response to The Presiding Officers’ Inquiry*, Indiana Utility Regulatory Commission Cause Nos. 42500, *et. seq.* at 5 (July 29, 2004). Attachment C.

⁴ Arbitration of Non-costing Issues for Successor Agreements to the Texas 271 Agreement, *Joint CLECs’ Initial Brief on Commission’s Authority to Arbitrate Terms and Conditions of Section 271 Unbundled Network Elements*, Public Utility Commission of Texas Docket No. 28821 at 2-3 (Aug. 10, 2004). Attachment D. The Texas Commission currently has this issue posted for its open meeting agenda on August 19, 2004.

⁵ *United States Telcom. Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002).

⁶ There is no merit to the claims of several commenters that 47 U.S.C. § 252(e)(6), which grants federal district courts authority to review state commission determinations in § 252 proceedings, prevents the Commission from taking action on BellSouth’s petition for declaratory ruling. *See, e.g., NARUC Comments* at 2-3; *PACE, et. al. Comments* at 3-4; *Z-Tel Comments* at 22-23. BellSouth’s possible remedy of a judicial appeal against the TRA

I. STATES HAVE NO AUTHORITY UNDER ANY PROVISION OF THE ACT TO REGULATE THE RATES, TERMS, OR CONDITIONS OF ITEMS REQUIRED BY THE COMPETITIVE CHECKLIST

Looking at the terms of the Act itself, it is clear that § 271 confers no authority upon the states to regulate the rates, terms, or conditions of the items required by the § 271 competitive checklist. Rather, those terms make clear that it is the Commission, and *only* the Commission, that has authority under § 271 to review the rates, terms, or conditions under which the BOCs provide the items required by the competitive checklist.

First, § 271 is clear that it is the Commission, and only the Commission, that is responsible for approving § 271 applications in the first instance. Thus, a BOC may provide interLATA services originating from in-region states only after submitting an application, *to the Commission*⁷ and only after approval of the application is granted *by the Commission*.⁸ During the application process, § 271 sets forth no role for the states other than as a consultant, *to the Commission*, in order to verify, *for the Commission*, initial compliance by an applicant BOC with the requirements of § 271(c).⁹

pursuant to 47 U.S.C. § 252(e)(6) does not divest the Commission of its statutory authority to issue declaratory rulings to “terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e). If it did, CLECs could render the Commission powerless to issue declaratory rulings on *any* subject merely by including such subjects in their requests for negotiation and subsequent arbitration. Moreover, in its *Triennial Review Order* the Commission confirmed that a party aggrieved by a state unbundling decision “may seek a declaratory ruling from this Commission.” *Triennial Review Order* ¶ 195. Similarly, commenters are also incorrect in arguing that this issue is not ripe for a declaratory ruling because the TRA has not yet issued a written order. *See, e.g., Covad Comments* at 6-7; *NARUC Comments* at 2. The Commission has long held that it is not bound by judicial “case or controversy” requirements, and it may issue declaratory rulings to preempt state action when “recent and potential State actions have tended to create uncertainty regarding the scope of State authority to impose requirements.” Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission, *Memorandum Opinion and Order on Reconsideration*, 98 F.C.C.2d 777, FCC 84-268 ¶ 10 (1984).

⁷ 47 U.S.C. § 271(d)(1).

⁸ 47 U.S.C. § 271(d)(3).

⁹ 47 U.S.C. § 271(d)(2)(B)(emphasis added). There is no basis in the language of the statute for Cbeyond’s contention that Congress anticipated that this purely consultative role would be transmogrified into the power to “establish just and reasonable rates, terms, and conditions” for competitive checklist items. *Cbeyond Comments* at 8-9. Congress certainly knew how to specifically provide a role for the states where it thought appropriate, *e.g.*, § 252, and the fact that it omitted any such role entirely from § 271 only serves to confirm that the states have no authority to regulate the rates, terms, or conditions of competitive checklist items.

Similarly, once an application is approved, § 271 provides authority only to the Commission to enforce continued BOC compliance with the conditions for approval and to impose penalties for non-compliance, including revocation of approval.¹⁰ There is no provision in § 271 providing any role to the states—not even a consultative role—with respect to the ongoing obligations of the BOCs once they have received approval to provide interLATA services. The plain terms of the statute thus make clear that states have no role—either with respect to an initial application or to subsequent enforcement of an approval—in regulating the rates, terms, or conditions of the items required by the competitive checklist.¹¹

Undaunted by the lack of any role afforded state commissions under the plain terms of § 271, several commenters endeavor to shoehorn such a role into the language of §§ 271(c)(1)(A) and 271(c)(2)(A).¹² Their efforts are misplaced. Both §§ 271(c)(1)(A) and 271(c)(2)(A) refer to agreements *approved under § 252*, and § 252 only confers upon the states the authority to arbitrate issues and to set rates for UNEs that must be unbundled “*for purposes of [§ 251(c)(3)]*.”¹³ As the Commission has stated, § 252(d)(1) “is quite specific in that it only applies for the purposes of implementation of section 251(d)(3)” and “does not, by its terms” grant the states any authority as to “network elements that are required only under section 271.”¹⁴

Although the TRA premised its decision solely on its mistaken belief that it had authority under § 271, the TRA now also claims that it has authority under state law to regulate the rates,

¹⁰ *Id.* § 271(d)(6).

¹¹ It is thus not surprising that none of the comments point to any federal authority suggesting that states may regulate the rates, terms, or conditions of competitive checklist items. To the contrary, they gloss over the one federal court of appeals decision that held that a state may not “parlay its limited role in issuing a recommendation under section 271” to impose substantive requirements under the guise of § 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004).

¹² See *AT&T Comments* at 12; *Covad Comments* at 3-4; *DeltaCom Comments* at 7-9; *PACE, et. al. Comments* at 5-6; *Z-Tel Comments* at 6.

¹³ 47 U.S.C. 252(d)(1).

¹⁴ *Triennial Review Order* ¶ 657.

terms and conditions of items required by the competitive checklist.¹⁵ Such regulation, however, would clearly conflict with established federal interests. There is no question that the 1996 Act supplants any traditional authority of the states with respect to the local competition provisions of the Act. As the Supreme Court has held, Congress's enactment of the 1996 Act "has taken the regulation of local telecommunications competition away from the States," rendering any issue within the 1996 Act's ambit "unquestionably" a matter of federal law.¹⁶ Moreover, the Commission has, in fact said that it has "sole authority" to administer § 271.¹⁷ Indeed, the Commission held specifically that in those instances in which the Act confers authority upon the Commission, "the 1996 Act's silence regarding state jurisdiction, rather than implicitly allocating jurisdiction to the states, assures that Commission jurisdiction is not superseded."¹⁸ And the Supreme Court has agreed that, as to matters covered by the 1996 Act, the Commission is permitted to "draw the lines to which [state commissions] must hew."¹⁹ Any state effort to regulate any of the rates, terms, or conditions of items required under § 271 would usurp the role assigned by Congress to the Commission and would conflict with established federal policies.²⁰

In short, states have no authority to impose any obligations, much less to set rates, to ensure compliance with § 271.²¹ Indeed, the constraints on state commission authority under §

¹⁵ *TRA Comments* at 20-25.

¹⁶ *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1999); see also *Indiana Bell*, 359 F.3d at 497 ("It is uncontroverted that in the Act, Congress transferred broad authority from state regulators to federal regulators, even while it left corners in which the states had a role.")

¹⁷ Memorandum Opinion and Order, US West Petitions to Consolidate LATAs in Minnesota and Arizona, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, FCC 99-222 ¶ 19 (Sept. 1, 1999).

¹⁸ *Id.* ¶ 18

¹⁹ *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

²⁰ See *SBC's Comments* at 4-11.

²¹ AT&T grossly mis-quotes the D.C. Circuit decision in the appeal of the Commission's approval of SBC's Kansas/Oklahoma § 271 application. *Sprint Communications Co., L.P. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001). AT&T suggests that in the *Sprint* case the D.C. Circuit noted "that the competitive checklist requirements are 'enforced by state regulatory commissions pursuant to § 252.'" *AT&T Comments* at 12. That is most definitely *not* what the D.C. Circuit said. What the D.C. Circuit actually said was, "Many of these [competitive checklist] requirements are simply incorporations by reference of obligations independently imposed on the BOCs by §§ 251-252 of the Act and enforced by state regulatory commissions pursuant to § 252." *Id.* at 552 (internal citation

252 confirm that the sole authority to implement the requirements of § 271 resides in the Commission.

II. THE ARBITRATION AUTHORITY UNDER § 252 DOES NOT EMPOWER THE STATES TO REGULATE THE RATES, TERMS, OR CONDITIONS OF COMPETITIVE CHECKLIST ITEMS

Some parties claim that, notwithstanding the lack of any role afforded the states by § 271, the authority conferred upon the states under § 252 to arbitrate “any open issues” gives the states the authority to regulate the rates, terms, and conditions of items required by the competitive checklist.²² In effect, they claim that the Act’s arbitration provisions give the states unfettered authority over any substantive issue raised by CLECs in their interconnection negotiations with ILECs. That open-ended interpretation of the scope of the states’ arbitration authority under § 252 must be rejected.

Section 252 only confers upon the states the power to conduct arbitrations to resolve issues concerning the obligations of § 251 and to review and approve interconnection agreements setting forth such obligations. First, § 251(c)(1) sets forth the issues that an ILEC must negotiate, and thus could potentially become subject to arbitration. By the plain terms of § 251(c)(1), the scope of such issues is limited to “the particular terms and conditions of agreements *to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.*”²³ Similarly, in the event the parties are unable to reach agreement, § 252 sets forth the standards for states to follow in conducting arbitrations. Specifically, § 252(c)(1) directs the states to “ensure that resolution and conditions meet *the requirements of section 251*, including

omitted). Thus, the *Sprint* decision actually supports the conclusion that, while the Act empowers the states to enforce the provisions of §§ 251 and 252, the states have no such power under the Act to enforce the independent obligations of the competitive checklist.

²² See, e.g., *Covad Comments* at 10-12; *DeltaCom Comments* at 5-7; *NARUC Comments* at 3-5; *PACE Comments* at 7; *US LEC Comments* at 2-4; *TRA Comments* at 10-12; *Z-Tel Comments* at 10-12.

²³ 47 U.S.C. § 251(c)(1)

the regulations prescribed by the Commission pursuant to section 251; establish any rates for interconnection, services, or network elements according to [§ 252(d)]; and provide a schedule for implementation of the terms and conditions by the parties to the agreement.”²⁴ In addition, § 252(e)(2) provides that a state commission may reject an agreement “adopted by arbitration under subsection (b) if it finds that the agreement does not meet *the requirements of section 251*, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in [§ 252(d)].”²⁵ In contrast, nowhere does the Act direct state commissions to arbitrate disputes concerning, or approve interconnection agreements containing, obligations other than those set forth in § 251. The Act is clear that the states only have authority under § 252 to arbitrate issues arising under § 251.²⁶

Some commenters rely on the decision of the United States Court of Appeals for the Fifth Circuit in *Coserv Ltd. Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 488 (5th Cir. 2003), to support their claim that states have unlimited power under § 252 to arbitrate issues beyond those arising out of § 251 obligations. That, however, is plainly wrong, and if it is indeed the decision of *Coserv*, then *Coserv* was wrongly decided. Such an interpretation completely divorces the “any open issues” phrase in § 252 from the provisions of §§ 251 and 252 limiting the substantive scope of state involvement in the § 252 process. The practical effect of such an interpretation also establishes enormous obstacles to negotiation, thus undermining the

²⁴ 47 U.S.C. § 252(c)(1). (Emphasis added.)

²⁵ 47 U.S.C. § 252(e)(2)(B). (Emphasis added.)

²⁶ Similarly, the Act is clear that states only have authority to review negotiated agreements that address § 251 obligations. Section 252(a) states that, “upon receiving a request for interconnection, services or network elements pursuant to section 251,” an ILEC “may negotiate and enter into a binding agreement with the requesting telecommunications carrier without regard to the standards set forth in subsections (b) and (c) of section 251.” 47 U.S.C. § 252(a)(1). It then provides that any such agreement “shall be submitted to the State commission.” *Id.* Accordingly, based on the language of section 252(a) itself, the only agreement that must be filed with a state commission is one that is triggered by “a CLEC request for interconnection, services or network elements pursuant to section 251.” *Id.* (Emphasis added.) The Commission should confirm this conclusion by affirmatively ruling on SBC’s May 3, 2004, *Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations*.

Commission's policy objective of encouraging such negotiations.²⁷ It simply can not be the case as some commenters suggest, that the "any open issues" phrase in § 252 affords the states the authority to reach beyond the obligations set forth in § 251.

The suggestion that § 252 provides such authority would, moreover, lead to absurd results. By its own logic, it would mean that the states possess unconstrained authority to arbitrate literally any issue raised by a CLEC, regardless whether such issue is grounded in §§ 251, 271 or any other provision of the Act. It would ground state authority not on the substantive parameters of the Act (or indeed any statute) but on the scope of CLEC negotiation demands. Thus state commissions could potentially have authority over issues having nothing to do with the specific requirements imposed on ILECs under the Act. It also would mean that state commissions have jurisdiction over interstate services—such as interstate access—so long as a CLEC raises such issues in its request for negotiations. To accept this theory, moreover, one would have to assume that Congress directed state agencies to decide an unlimited number of issues without providing *any* guidance as to how such decisions should be made. There is no reason to conclude that Congress intended to impose such a limitless and nonsensical obligation. Only by applying some limiting standard—based on the substantive requirements of § 251—to § 252's requirements, can such absurd results be avoided.

Indeed, a more reasoned and practical interpretation of the scope of the states' § 252 authority was provided by the Eleventh Circuit in *MCI Telecomms. Corp. v. BellSouth Telecomm., Inc.*, 298 F.3d 1269 (11th Cir. 2002), which determined that when read in conjunction with the other provisions of the statute, the "any open issues" phrase must be read to

²⁷ See Letter from Chairman Michael K. Powell, *et al.*, FCC, to Edward Whitacre, SBC Communications, at 1 (Mar. 31, 2004) ("March 31 Letter").

include some substantive limits tied to the obligations set forth in § 251.²⁸ As the court found, a rule that required arbitration of “any issue raised by the moving party” would be “contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.”²⁹ The Eleventh Circuit’s analysis better reflects the structure and intent of the Act.

Interpreting § 252 in this manner also is consistent with the core purposes of the Act. Sections 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition. It would make sense, therefore, that Congress would set forth provisions governing the negotiation, arbitration, and state review process for agreements pursuant to which the parties endeavor to meet such requirements. Conversely, there would appear to be no reason why Congress would subject arrangements for other services and facilities to the same terms. Since Congress did not deem such requirements important enough to include in the Act in the first place, it would be odd to construe the Act as requiring state involvement in disputes over such issues.

This result is also consistent with the Commission’s *Qwest ICA Order*.³⁰ In that order, the Commission determined that BOCs have an obligation to file with state commissions all contracts that “create[] an ongoing obligation *pertaining to* resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, unbundled network elements, or collocation,” *i.e.*, the requirements of sections 251(b) and (c).³¹ At the same time, the Commission made clear that its order does not require the filing of “all agreements between

²⁸ *MCI Telecomms*, 298 F.3d at 1274.

²⁹ *Id.*

³⁰ Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337, FCC 02-276 (2002) (“Qwest ICA Order”).

³¹ *Qwest ICA Order* ¶ 8.

an incumbent LEC and a requesting carrier.”³² Moreover, the Commission specifically premised this conclusion on its holding that “only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1).”³³ The Commission’s own precedent thus confirms that states may not rely on their § 252 authority to arbitrate issues other than those pertaining to the obligations set forth in § 251 of the Act.

CONCLUSION

The Commission should issue a declaratory ruling that states have no authority to regulate the rates, terms, or conditions of items required by the competitive checklist of § 271. Such action is urgently needed to stem the ongoing CLEC campaign to appropriate the Commission’s authority over unbundling decisions.

Respectfully Submitted,

/s/ Jim Lamoureux

Jim Lamoureux

Gary L. Phillips

Paul K. Mancini

SBC COMMUNICATIONS INC.

1401 I Street NW 4th Floor

Washington, D.C. 20005

202-326-8895 – phone

202-408-8745 - facsimile

Its Attorneys

August 16, 2004

³² *Id.* n 26

³³ *Id.*

ATTACHMENT A

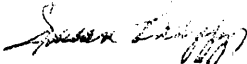
**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners:

Brian J. Moline, Chair
John Wine
Robert E. Krehbiel

STATE CORPORATION COMMISSION

SEP 19 2003

 Docket
Room

In the Matter of the General Investigation to)
Implement the State Mandates of the Federal)
Communications Commission's Triennial)
Review Order)
_____)

Docket No. 03-GIMT-1063-GIT

**COVAD'S RESPONSE TO COMMISSION ORDER AND COMMENTS
ON THE EFFECT OF THE FCC'S TRIENNIAL REVIEW ORDER**

On September 8, 2003, the Commission issued an order requesting comments from interested parties on selected issues presented by the Federal Communications Commission's ("FCC") *Triennial Review Order*.¹ Covad Communications Company ("Covad") respectfully addresses certain of those issues and submits supplemental comments regarding the effect of the FCC's Order.

I. Responses to Commission Issues.

A. Initiation of 90-Day Proceeding and Associated Procedures.

Covad does not plan to initiate or participate actively in a 90-day proceeding regarding impairment of carriers without unbundled access to local circuit switching for service to enterprise market customers. Accordingly, Covad makes no recommendations as to appropriate processes and procedures for such proceedings.

¹ *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), rel. August 21, 2003.

B. Processes and Procedures for 9-Month Analyses

Covad does not believe that separate proceedings are necessary for the two Kansas ILECS that are subject to the *Triennial Review Order*.

Effective participation in the 9-month analysis will require that requesting parties have access to highly confidential information. Thus, it will be necessary for the Commission to enter a protective order permitting discovery of such information subject to execution of nondisclosure certificates by individuals reviewing the information. A protective order mirroring that adopted by the Commission in other recent telecommunications dockets would appear to suffice.

Because of the complexity, time constraints, and uncertainty currently attending the *Triennial Review* analytical process, Covad would recommend that the Commission convene a discovery-prehearing conference at the earliest possible time where procedural and scheduling issues could be addressed.¹ To the extent technical evidentiary hearings are determined to be necessary, Covad would request that the number of such hearings be limited because of the demands of participating in similar proceedings throughout the country and that its scheduling of witnesses be as flexible as reasonably possible, taking into account the Commission's concern for efficient and orderly conduct of proceedings. The Commission may wish to consider whether it would be feasible and provide additional flexibility for parties and witnesses to conduct a single technical hearing in which receipt of evidence is segmented by broad topical area.

II. Will This Commission Preserve Voice and Data Competition in Kansas?

The *Triennial Review Order* has vested state commissions with responsibility for determining the future of competition in the local telecommunications market. Specifically, the FCC has explicitly delegated to the states the authority to determine whether competitors are entitled to access switching in the residential market during a 9-month impairment proceeding. The future of voice competition in the residential market will hinge upon the ability of competitors to provide a bundled voice and data product, and hence, this Commission must address line splitting rates, terms, and conditions in connection with the 9-month switching proceeding. Likewise, the future of internet access competition—which is dependent upon interoffice transport and high capacity loops—is even more dependant upon access to the HFPL and hybrid loops, and hence, this Commission must confirm that competitors are entitled to access to these essential elements in connection with the 9-month loop and transport docket.²

Should the Commission fail to address line splitting issues in its 9-month switching proceeding, the outcome of that docket will be of little consequence because the future of voice competition in the residential market is dependent upon competitors being able to compete with SBC's bundled voice and data product. Should the Commission fail to confirm that competitors are entitled to access the HFPL and hybrid loops in its 9-month loop and transport proceeding, the outcome of that docket will also be of little consequence because the future of internet access competition in the residential market is dependent

² The "HFPL" is the High Frequency Portion of the Loop used to provide a line shared service (ILEC voice and CLEC data). "Hybrid Loops" refer to loops comprised of both fiber and copper facilities. SBC has named its hybrid loop architecture "Project Pronto."

upon competitors being able to compete with SBC's data products, which SBC itself provisions over the HPFL and hybrid loops. In support of this Commission's authority to pursue these critical issues, Covad offers the following analysis.

III. Line Splitting

A. The FCC Has Ordered SBC to Make the Network Modifications Necessary to Provide Nondiscriminatory Access to Line Splitting.

The FCC was unequivocal in its *Triennial Review Order* that incumbents must provide competitors with the ability to compete with voice and data bundles via line splitting. Section (a)(1)(ii) of Rule 51.319, entitled "Specific Unbundling Requirements," states:

Line splitting. An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.

(A) An incumbent LEC's obligation, under paragraph (a)(1)(ii) of this section, to provide a requesting telecommunications carrier with the ability to engage in line splitting applies **regardless of whether the carrier providing voice service provides its own switching or obtains local circuit switching as an unbundled network element pursuant to paragraph (d) of this section.**

(B) An incumbent LEC must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.³

³

47 C.F.R. § 51.319(a)(ii) (emphasis added).

As the FCC Rule makes clear, an incumbent's obligation to provide line splitting is independent of its obligation to provide unbundled local switching. Moreover, the FCC implicitly recognized that incumbents were not providing nondiscriminatory access to OSS, and thus directed incumbents to make such nondiscriminatory access available. Accordingly, this Commission should enforce the FCC's mandate that SBC modify its network to support nondiscriminatory access to line splitting.

B. Line Sharing, Line Splitting, and Line Saving Require the Same Treatment.

When an incumbent (*e.g.* SBC) provides a customer with voice service and a competitor (*e.g.* Covad) provides the same customer with data (DSL) service on the same loop, this process is called line sharing. That is, the incumbent and the competitor "share" the loop: the incumbent provides voice service over the Low Frequency Portion of the Loop ("LFPL") and the competitor provides data service over the High Frequency Portion of the Loop ("HFPL"). When a voice competitor (*e.g.* AT&T or MCI) provides a customer with voice service and a data competitor (*e.g.* Covad) provides the same customer with data (DSL) service on the same loop, this process is called line splitting.⁴ That is, two competitors "split" the loop: the voice competitor provides voice service over the LFPL and the data competitor provides DSL over the HFPL. When an incumbent (*e.g.* SBC) provides a customer with both voice and data service on the same loop, this process is called line saving.⁵ That is, the incumbent "saves" the costs (in terms of both time and

⁴ In most line splitting arrangements two competitors partner to provide customers with a combined voice and data service. However, it is possible for a single competitor to engage in line splitting by providing the end user with both the voice and data services.

⁵ To the best of Covad's knowledge, no commission has utilized the term "line saving." Covad has coined that term and used it here for the sake of convenience.

money) of provisioning a second loop, and provides its customer with both voice service (over the LFPL) and data service (over the HFPL) on the same loop.⁶ In all three arrangements, line sharing, line splitting, and line saving, the customer receives the same services—a bundle of voice and data services—using a single loop in the same way. The *only* difference is whether those services are being provided in whole or in part by the incumbent or a competitor. Indeed, this Commission has already reached this precise conclusion, stating, “Technically, line sharing and line splitting arrangements are the same. The physical configuration for line sharing with SWBT is identical to the configuration used for line splitting where the splitter is owned by a competitive LEC.”⁷ Accordingly, the terms and conditions pursuant to which the incumbent provisions line sharing, line splitting, and line saving should be the same. SBC, however, discriminates against competitors seeking to provide a combined voice and data service via line splitting.

C. SBC Admits that Bundled Voice and Data Products are Essential for Success.

Recently SBC issued a press release attributing its growing DSL business to its ability to provide customers with a voice and data bundle. SBC chairman and CEO Edward E. Whitacre Jr. stated: “Customers are buying DSL as part of a bundle with other SBC services because they're attracted to the value and convenience. Our aggressive DSL deployment over the past several years and strong offers have made us the industry's DSL

⁶ When SBC provides a customer with both voice and data service this is arguably called line sharing since SBC provides its data service through an affiliated data CLEC called ASI.

⁷ *In the Matter of the General Investigation to determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing*, Kansas Corporation Commission Docket No. 01-GIMT-032-GIT, Ordering 19: Decision on Digital Subscriber Line Services and Line Splitting, dated January 13, 2003, p. 53.

leader.”⁸ Mr. Whitacre further noted that bundling of local, long distance, and data services would continue, stating “We will continue to roll out new data products in the coming months, particularly as we gain long distance freedoms in the Midwest, which we expect will happen this fall.”

D. SBC’s Line Splitting Processes and Rates Constitute a Barrier to Competitive Entry in the Provision of Voice and Data Bundles.

While incumbents benefit from the ability to bundle voice and data via line saving, the lack of parity between line saving and line splitting erects an almost insurmountable barrier to competitive entry in the provision of combined voice and data services. For example, there are customer impacting limitations on the timing of line splitting orders;⁹ there are discriminatory versioning policies for the submission of line splitting orders;¹⁰ there are inadequate trouble ticket and repair processes for line splitting;¹¹ the non-recurring charges for line splitting are not TELRIC compliant;¹² there are customer impacting limitations on line splitting with the hunting feature;¹³ there are customer-

⁸ Press Release, “SBC Communications Reaches 3 Million DSL Customer Mark,” (Sept. 9, 2003).

⁹ For example, SBC will not allow competitors to place an order for line splitting over UNE-P. Rather, competitors must first place an order for a UNE-P arrangement, and then submit a separate order for line splitting, delaying the installation process.

¹⁰ For example, SBC requires both the voice CLEC and data CLEC to be on the same “dot” version of EDI in order to submit a line splitting order. This prevents line splitting partnerships where the voice and data CLEC are on different versions of EDI.

¹¹ For example, SBC will not “strap out” the voice loop at the MDF for a competitor if there is a problem with the data portion of the loop in a competitor’s collocation cage. SBC will engage in such a process for its own voice customers.

¹² For example, when migrating a customer from UNE-P to line splitting, SBC seeks to charge competitors three (3) service order charges and to assess a new loop installation charge (even though the customer is already receiving voice service over an existing loop).

¹³ For example, SBC does not allow a customer to employ the hunting feature on a line split line unless all the lines in the hunt group have DSL.

service-threatening processes involved with disconnecting data service from a line splitting arrangement and migrating back to UNE-P;¹⁴ and SBC has in place a policy that threatens the accuracy of essential E911 databases.¹⁵ See Attachment A, Joint Declaration of Catherine Boone and Colette Davis.¹⁶ Thus, the incumbents' line splitting provisioning and repair practices must be equal to (if not better than) their provisioning and repair practices for line saving, if mass market competition is to survive.

E. There Is a Simple Solution to Remedy SBC's Discriminatory Line Splitting Practices.

Fortunately, most of the barriers erected by SBC to competitive provisioning of line splitting can be razed by this Commission with little effort. Because the provisioning of line splitting is little different than the provisioning of line sharing, the Commission can level the playing field by requiring SBC to offer line splitting at the same rates, terms, and conditions upon which it offers line sharing.¹⁷ Indeed, this result is required by FCC Rule 51.319(a)(1)(ii).

¹⁴ For example, when a customer decides to migrate from a line splitting arrangement back to UNE-P (the customer drops their data service), SBC indicates that the customer may lose its voice service for up to five (5) days, and could lose their telephone number. To avoid this, competitors are presented with the uneconomic and untenable option of not disconnecting the data portion of the line split loop and stranding the capacity of the splitter and DSLAM ports used by that loop.

¹⁵ For example, SBC refuses to update the E911 database in a UNE-P or line splitting arrangement.

¹⁶ This declaration was filed as part of the Emergency Joint Petition for Stay by the Choice Coalition (including Covad) in the FCC's Triennial Review docket. The purpose of this declaration was to demonstrate to the FCC that its factual basis for eliminating line sharing—the availability of line splitting—was unfounded because the incumbents' line splitting processes and rates are not at parity with their line sharing (or line saving) processes and rates.

¹⁷ In fact, SBC is required to provide access to line splitting at parity with the manner in which it provisions a voice and data bundle to its customers (line saving). SBC, however, has not made these processes publicly available, and as an interim measure, line sharing processes are the best available proxy for how the incumbent provisions its own bundle.

Specifically, this Commission should issue an interim order ruling that SBC is required to provide non-discriminatory access to line splitting at parity with its line sharing processes, including, at a minimum, that:

- SBC's total non-recurring charges (including service order charges, installation charges, and any disconnect charges for migrating a customer from UNE-P to line splitting) should be no higher than the total non-recurring charges for provisioning a line shared loop;
- SBC's operations support systems for line splitting orders should be as efficient as its operations support systems for line sharing, including, at a minimum, mechanized ordering and flow through processes for migrations from UNE-P-to-line splitting and line sharing-to-line splitting;
- SBC's provisioning and maintenance for line splitting should be consistent with its provisioning and maintenance for line sharing, including consistent provisioning and testing intervals, trouble-ticket/repair performance, and disconnect procedures.

As a matter of law, the Commission can issue an interim order to make these determinations based upon FCC Rule 51.319(a)(1)(ii) without taking evidence. In the alternative, the Commission can issue an interim order making these determinations based upon the evidence submitted in connection with the Commission's Line Sharing Decision in KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003). In the alternative, the Commission can take evidence on these issues and issue a final order in this proceeding.

F. Will This Commission Preserve the Future of Competition in the Residential Local Voice Market By Ensuring That Line Splitting Is Accorded the Same Treatment as Line Sharing and Line Saving?

If this Commission fails to order non-discriminatory access to line splitting, as described above, the promise of vigorous competition in Kansas' residential local voice market will be lost regardless of the decision that is ultimately made on the availability of

mass market switching as part of the UNE-Platform. Accordingly, during its nine-month investigation of whether competitors are impaired without UNE access to local switching in mass markets, Covad respectfully requests that this Commission issue an interim order requiring SBC to provide non-discriminatory access to line splitting.

IV. Line Sharing (HFPL) and Hybrid Loops (Project Pronto).

A. The KCC's Independent State Law Authority to Unbundle the HFPL and Hybrid Loops Is Preserved by the Act and Has Not Been Preempted by the FCC.

In addition to ensuring that voice competition thrives by allowing competitors to bundle voice with data, this Commission must also ensure continued competition in the internet access market by requiring SBC to provide access to the HFPL and hybrid loops. The Commission has previously acted to require such access, and thus, the question before this Commission is this: Does this Commission want to stand on its independent state law authority and deliver the benefits of broadband competition to Kansas telecommunications consumers, or does this Commission want to unnecessarily surrender its responsibility for Kansas broadband competition policy to the FCC. Covad respectfully submits there is only one answer: This Commission must stand on its independent state law authority to unbundle line sharing, protect Kansas consumers by delivering broadband competition, and fight the incumbent monopolist and the FCC who are seeking to deprive this Commission of its independent authority and to limit its jurisdiction.

B. The KCC Has Independent State Law Authority to Unbundle the HFPL.

This Commission has previously acknowledged its independent authority under Kansas law to require SBC to provide competitors with access to the HFPL pursuant to the

Kansas Telecommunications Act, K.S.A. 2001 Supp. 66-2001. As this Commission has found:

In light of the U.S. Telecom decision [vacating the FCC's Line Sharing Order which provided unbundled access to the HFPL],¹⁸ this Commission concludes it should make an independent decision regarding whether SWBT should be required to provide access to the HFPL. . . . [T]he Commission is charged with ensuring that consumers throughout the state "realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates. The Commission must also promote access to all consumers "to a full range of telecommunications services, including advanced telecommunications services that are comparable in urban and rural areas throughout the state." K.S.A. 2001 Supp. 66-2001(c). . . . To achieve the goals of K.S.A. 2001 Supp. 66-2001, and to promote the continued growth of competition in the telecommunications market in Kansas, this Commission concludes it is critical to allow competitive LECs access to the HFPL where ASI has that access.¹⁸

Likewise, the Commission has found that competitors are entitled to access hybrid loops, specifically, SBC's Project Pronto DSL architecture.

The Commission concludes it continues to have authority pursuant to 47 U.S.C. § 251(d)(3) to decide interconnection issues presented by this docket. In this Order, the Commission's review does not conflict with federal law, but instead addresses the Circuit Court's criticism of the FCC orders while considering Kansas-specific circumstances presented by the parties in this docket. Also, the Commission concludes that by deciding the issues in this docket it is fulfilling its obligations under K.S.A. 2001 Supp. 66-2001. The Commission will use the FCC orders and regulations as guidance in evaluating the issues presented in this complex docket, but it will take into account the principles set out in *U.S. Telecom*. If, after this Order is issued, the FCC revises its requirements regarding the analysis a state commission should use in considering the issues in this docket, the Commission will not hesitate to conduct further evaluation as required by any newly adopted orders or regulations.¹⁹

¹⁸ KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003) (citing K.S.A. 2001 Supp. 66-2001).

¹⁹ *In the Matter of the General Investigation to determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing*, Kansas Corporation Commission Docket No. 01-GIMT-032-GIT, Ordering 19: Decision on Digital Subscriber Line Services and Line Splitting, dated January 13, 2003, pp. 4-5.

Accordingly, this Commission can, should, and indeed must affirm its Order unbundling the HFPL and hybrid loops under its own independent state law authority.

C. The KCC's Independent State Law Authority Is Preserved by the Act.

It is likewise beyond dispute that the authority granted in KTA § 66-2001 is not preempted by the federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority," explicitly states that:

[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.²⁰

Likewise, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" states:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.²¹

Accordingly, the Act preserves Kansas' independent authority set forth in KTA § 66-2001.

D. The KCC's Independent State Law Authority Was Not Preempted by the FCC in its *Triennial Review Order*.

It is likewise beyond dispute that the authority granted in KTA § 66-2001 is not preempted by the FCC's *Triennial Review Order*. Nor could it be. While the FCC has the authority to interpret the Act, it does not have the authority to rewrite it. Indeed, any deference previously accorded to the FCC's interpretation of the Act under the *Chevron*

²⁰ 47 U.S.C. § 252(e)(3).

²¹ 47 U.S.C. § 251(d)(3).

doctrine has long since been forfeited because the FCC's interpretation of the Act has been repeatedly reversed by the D.C. Circuit.²² Thus, notwithstanding any statements in the *Triennial Review Order*, the Act defines this Commission's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority.

Should this Commission place stock in the FCC's interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption:

Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.²³

The FCC further acknowledges in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.²⁴

Accordingly, the FCC has explicitly acknowledged that this Commission retains its independent unbundling authority.

²² MCI v. AT&T, 512 U.S. 218,229 (1994) (holding that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

²³ See *Triennial Review Order*, at ¶ 191.

²⁴ See *Triennial Review Order*, at ¶ 192.

1. The FCC Held that State Law Authority Is Preserved Unless the Exercise of That Authority Would “Substantially Prevent Implementation” of Section 251.

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws unbundling orders:

Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not “substantially prevent” the implementation of the federal regulatory regime...

[W]e find that the most reasonable interpretation of Congress’ intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not “substantially prevent” its implementation.²⁵

Based upon the Eighth Circuit’s *Iowa Utilities Board I* decision, the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC’s unbundling orders are not *ipso facto* preempted:

That portion of the Eighth Circuit’s opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must “substantially prevent” the implementation of the federal regime to be precluded and that “merely an inconsistency” between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).²⁶

In sum, the FCC’s *Triennial Review Order* confirms that “merely an inconsistency” between state rules providing for competitor access and federal unbundling rules is insufficient to create such a conflict. Rather, the FCC recognized that the state laws would

²⁵ See *Triennial Review Order*, at ¶¶ 192, 194.

²⁶ See *Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

not be subject to preemption unless they “substantially prevent implementation” of section 251.

2. The FCC Did Not Conclude That Any Existing State Commission Orders Unbundling the HFPL or Hybrid Loops Would “Substantially Prevent Implementation” of the Act or the FCC’s Rules.

In its *Triennial Review Order*, the FCC did not preempt *any existing* state law unbundling requirements, nor did it act to preclude the adoption of *any future* state law unbundling requirements. This is significant because Kansas has unbundled both the HFPL and hybrid loops pursuant to its independent authority. Likewise, California and Minnesota, have exercised their independent state law authority to unbundle the HFPL,²⁷ and Illinois, Wisconsin, and Indiana, have exercised their independent authority to unbundle hybrid loops.²⁸ The FCC declined to preempt any of the Kansas unbundling order, or any of the other aforementioned orders, stating only that “in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation.”²⁹ Accordingly, the FCC specifically acknowledged that in many circumstances state law unbundling of the HFPL or hybrid loops would be consistent with the FCC’s framework and would not frustrate its implementation.

²⁷ **California:** CPUC Docket No. R.93-04-003/I.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077(Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

²⁸ **Illinois:** ICC Docket No. 00-0393; *Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; *Investigation into Ameritech Wisconsin's Unbundled Network Elements* (March 22, 2002); **Indiana:** *IURC Cause Number 40611-S1, Phase II; In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rate's for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001).

²⁹ See *Triennial Review Order*, ¶ 195.

Recognizing its ability to preempt state unbundling orders was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling the HFPL or hybrid loops were preempted. Rather, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders “substantially prevent implementation” of Section 251. Contrary to this standard, however, the FCC stated that it was “*unlikely*” that it would refrain from preempting a state law or Order that required the “unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis.”³⁰ While the FCC’s preemption analysis (or more accurately, its unsupported supposition) is flawed, it is important to note that even pursuant to this faulty analysis the FCC expressly refused to conclude that an order unbundling the HFPL or hybrid loops would be preempted as a matter of law, thereby signaling to state commissions that the HFPL and hybrid loops could be unbundled under particular circumstances.

3. State Law Access Requirements Are Valid “As Long as the Regulations Do Not Interfere With the Ability of New Entrants to Obtain Services.”

As this Commission is well aware, the proper analysis to determine whether state access laws impermissibly conflict with the federal regulatory regime is set forth in *Michigan Bell v. MCIMetro*, 323 F.3d 348 (6th Cir. 2003). In *Michigan Bell*, the Sixth Circuit Court of Appeals refused to preempt an Order of this Commission (allowing MCI to transmit resale orders by fax pursuant to its Michigan tariff) which SBC argued “conflicted” with MCI’s tariff, and hence, the Act. Conducting its preemption analysis, the

³⁰

See *Triennial Review Order*, ¶ 195.

Sixth Circuit first noted that this Commission's authority was expressly preserved by the Act:

When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. *In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition*, stating that the Act does not prohibit state commission regulations 'if such regulations are not inconsistent with the provisions of [the FTA].'³¹

The Court then explained that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted."³²

The Court later reiterated that an Order of this Commission would be affirmed provided that it "does not frustrate the purposes of the Act."³³ An order requiring access to the HFPL or hybrid loops under Kansas law would not prevent a carrier from taking advantage of the network opening provisions of the Act, nor would such unbundling frustrate the purposes of the Act. The Court unequivocally stated:

The Commission can enforce state law regulations, *even where those regulations differ from the terms of the Act* or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.³⁴

Accordingly, contrary to the FCC's statement that it is "unlikely" that state laws requiring access to the HFPL would escape preemption, it is clear that this Commission had, and continues to have the authority to implement KTA § 66-2001 and require access to the

³¹ *Michigan Bell*, 323 F3d at 358.

³² *Id.* at 359.

³³ *Id.* at 361.

³⁴ *Id.*

HFPL and hybrid loops under Kansas law because such orders would not interfere with the ability of new entrants to obtain services.

4. This Commission Has Repeatedly Recognized that Its Independent Authority Under KTA § 66-2001 Cannot Be Circumscribed By FCC Orders.

This Commission has correctly concluded that erroneous FCC orders should not stand as an obstacle to opening Kansas markets to data competition. For example, in KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003), SBC argued that this Commission was precluded from ordering SBC to provide competitors with SBC-owned splitters for use in line sharing and line splitting arrangements pursuant to the FCC's determination in the *Line Sharing Order*. In order to promote competition in the Kansas internet access market, this Commission rejected SBC's argument that the FCC Order precluded further unbundling and found that SBC should be required to offer splitters where SBC is providing a line shared service with ASI.

This Commission has correctly and steadfastly refused to forfeit its responsibility to advance consumers' interests in Kansas by relying upon its independent state law authority. It should do so again here.

5. Contrary to its "Unlikely" Prediction, the FCC Acknowledges Unbundling Will Be Required Under Certain Circumstances.

Although the FCC stated that it was "unlikely" to refrain from preempting a state law unbundling access to the HFPL or hybrid loops, the *Triennial Review Order* broadly identifies the circumstances that would lead the FCC to decline to preempt a state commission order unbundling a network element that the FCC has declined to unbundle

nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that “the availability of certain network elements may vary between geographic regions.”³⁵ Indeed, according to the FCC, such a granular “approach is required under *USTA*.”³⁶ Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of section 251.

E. The KCC Has the Authority to Require SBC to Provide Access to HFPL and Hybrid Loops Consistent with Federal Law Based Upon Kansas-Specific Facts.

While the FCC’s *Triennial Review Order* found that competitors are not impaired on a national basis without access to the HFPL, the FCC also made clear that state-specific facts could warrant a different unbundling requirement in a particular state. Such state-specific circumstances warrant the unbundling of the HFPL in Kansas. That is, the facts relied upon by the FCC in reaching a national finding of non-impairment without access to the HFPL do not exist in the state of Kansas. Because of these Kansas-specific circumstances, an obligation imposed by Kansas law to unbundle access to the HFPL would not substantially prevent implementation of section 251 and the FCC’s federal unbundling regime. Accordingly, the FCC would be unlikely to preempt such a finding.

The primary and deciding factor relied upon by the FCC to make a national finding of non-impairment with respect to the HFPL is the supposed ability of competitors to obtain revenues from all of the services the loop is capable of offering, including voice and

³⁵ See *Triennial Review Order*, ¶196.

³⁶ See *Triennial Review Order*, para. 196 (citing *USTA*, 290 F.3d at 427).

data bundles using line splitting. In the state of Kansas, however, SBC has not made line splitting operationally available in the same manner as its own retail voice and data bundles. Indeed, as previously detailed, there are significant financial and operational obstacles to CLEC's providing line splitting in Kansas. See pp. 6-7, above. Because of the operational and cost disadvantages competitive data providers continue to face in providing line split voice and data bundles in Kansas, competitors face severe competitive disadvantages in obtaining "all potential revenues derived from using the full functionality of the loop."³⁷ Accordingly, the assumption underlying the FCC's conclusion that competitors are not impaired without access to the HFPL does not comport with the facts as they exist in Kansas.

Thus, in Kansas, the requisite state-specific circumstances exist for Kansas to unbundled access to the HFPL under its independent state law authority, without substantially preventing the implementation of section 251 of the federal Communications Act.

F. The KCC Has Authority Pursuant to Section 271 of the Act to Require SBC to Provide Unbundled Access to the HFPL.

In addition to its authority to unbundled network elements under K.S.A. 2001 Supp. 66-2001, this Commission also has the authority to enforce the unbundling requirements of Section 271 of the federal Telecommunications Act. The FCC made clear in the *Triennial Review* that section 271 creates independent access obligations for the Regional Bell Operating Companies:

³⁷ See *Triennial Review Order*, ¶ 258.

[W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.³⁸

Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.³⁹

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, as a Bell Operating Company SBC retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.⁴⁰ There is no question that SBC's network access obligations include the provision of unbundled access to loops under checklist item #4: "Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251."⁴¹

In addition, the Kansas Corporation Commission has independent authority to enforce these section 271 BOC obligations. Specifically, K.S.A. 66-1,188 grants to this Commission "full power, authority and jurisdiction to supervise and control the telecommunications public utilities doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." This authority encompasses the authority to ensure that SBC fulfills its statutory duties under section 271. Furthermore, not even SBC would argue that the Kansas Corporation

³⁸ See *Triennial Review Order*, ¶ 653.

³⁹ See *Triennial Review Order*, ¶ 655.

⁴⁰ See 47 U.S.C. § 271(c)(2)(B).

⁴¹ See *Triennial Review Order*, ¶ 654.

Commission's enforcement of SBC's section 271 checklist obligations would "substantially prevent the implementation" of any provision of the federal Telecommunications Act. In fact, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized.⁴² Indeed, the Act expressly preserves a state role in the review of a BOC's compliance with its section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a BOC's section 271 compliance.⁴³ Thus, the Kansas Corporation Commission clearly has the authority to enforce SBC's obligations to provide unbundled access to loops under Section 271 checklist item #4.

1. The KCC Has the Authority Under Section 271 to Require SBC to Provide Access to HFPL.

Although the FCC concluded in its *Triennial Review* that competitors are not impaired without unbundled access to the HFPL pursuant to section 251(c)(3) of the Act, the FCC acknowledged that section 271 creates separate, statutory HFPL unbundling obligations for the Bells, wholly separate and apart from the statutory unbundling obligations in section 251. SBC cannot deny that section 271 checklist item 4 requires the Bells to provide access to the HFPL. By its plain language, checklist item 4 requires the Bells to provide access to "local loop transmission from the central office to the customer's

⁴² See *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." See *De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S.Ct. at 1217).

⁴³ See 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing BOC compliance with the 271 checklist).

premises, unbundled from local switching or other services.”⁴⁴ The HFPL is clearly a form of loop transmission—a loop transmission that SBC itself routinely uses to provide xDSL services separately from narrowband voice services.⁴⁵ In light of this clear statutory language, there is no question that SBC remains under a statutory obligation to offer unbundled HFPL loop transmission to competitors, notwithstanding the FCC’s finding of no impairment pursuant to section 251.

Each time the FCC has reviewed a 271 application since the advent of line sharing the FCC has insisted the BOC long distance applicant offer non-discriminatory access to the HFPL in order to comply with checklist item #4.⁴⁶ To this day, months after its decision to eliminate HFPL access as announced in its February 20, 2003 press release, the FCC continues to look at the non-discriminatory availability of line sharing as an integral component of its checklist item #4 analysis in section 271 proceedings.⁴⁷ The significance of this point cannot be overstated. The FCC required Qwest, the BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item #4 of section 271 more than a month after the FCC voted to eliminate line sharing (the HFPL) as a UNE.⁴⁸ There is

⁴⁴ See 47 U.S.C. § 271(c)(2)(B)(iv).

⁴⁵ In other words, SBC customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

⁴⁶ See, e.g., *Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶ 214-219 (2001).

⁴⁷ See *Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, Memorandum Opinion and Order, WC Docket No. 03-90, FCC 03-142, para. 53, and App. C, ¶¶ 50-51.

⁴⁸ See *id.* at ¶ 1.

simply no question that the Act, and the FCC, require SBC to provide non-discriminatory access to the HFPL if SBC desires to provide long distance services.

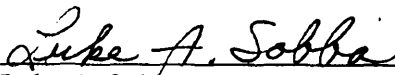
V. The Commission Clearly Has the Power and Authority to Save Voice and Data Competition; the Only Question Is Whether the Commission Will Do So.

The ability of competitors to provide a voice and data bundle will determine whether competition flourishes in the residential voice market. For this reason, the Commission must address line splitting issues in connection with its 9-month switching proceeding. Likewise, competition in the internet access market will wither on the vine if this Commission fails to address HFPL and hybrid loop access pursuant to its independent state law authority, which Covad respectfully submits that it has demonstrated, beyond credible refutation, that this Commission retains notwithstanding the *Triennial Review Order*. Covad appreciates the opportunity granted by this Commission to submit these Comments, and looks forward to demonstrating to this Commission that Kansas telecommunications consumers are entitled to, and deserve, the benefits of competition: better services and lower prices.

Respectfully submitted,

William J. Cobb III
Senior Counsel
COVAD COMMUNICATIONS COMPANY
100 Congress Avenue, Suite 2000
Austin, Texas 78701
Telephone: 512 469-3781
Facsimile: 512 469-3783
E-Mail: bcobb@covad.com

Michael Lennen, KBA #08505
MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chartered
300 North Mead, Suite 200
Wichita, Kansas 67202-2722
Telephone: 316 262-2671
Facsimile: 316 262-6226
E-Mail: mlennen@morrislaing.com



Luke A. Sobba, KBA #20812
MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chartered
800 SW Jackson, Suite 1310
Topeka, Kansas 66612-2214
Telephone: 785 232-2662
Facsimile: 785 232-9983
E-Mail: lsobba@morrislaing.com

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2003, the original and seven copies of the foregoing pleading were hand-delivered to:

SUSAN K. DUFFY, Executive Director
KANSAS CORPORATION COMMISSION
1500 SW Arrowhead Rd
Topeka KS 66604;

and that one copy was mailed to each of the following counsel or parties of record:

Susan Cunningham, General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Rd
Topeka KS 66604

David R. Springe
Niki Christopher
James Brent Getty
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Rd
Topeka KS 66604

Timothy S Pickering
Bruce A Ney
Melanie N Sawyer
Southwestern Bell Telephone LP
220 E 6th St Rm 515
Topeka KS 66603-3596

Mark P Johnson
Trina R LeRiche
Sonnenschein Nath & Rosenthal
4520 Main St Ste 1100
Kansas City MO 64111

Carol Keith
NuVox Communications Inc
16090 Swingley Ridge Rd Ste 500
Chesterfield MO 63017

Robert A. Fox
Foulston Siefkin LLP
555 S Kansas Ave Ste 101
Topeka KS 66603-3423

Robert W McCausland
Vice President Regulatory Affairs
Sage Telecom Inc
805 Central Expressway S Ste 100
Allen TX 75013-2789

Katherine K Mudge
Smith Majcher & Mudge LLP
816 Congress Ave Ste 1270
Austin TX 78701

Edward Cadieux Executive Director
Regulatory and Public Affairs
NuVox Communications Inc
16090 Swingley Ridge Rd Ste 500
Chesterfield MO 63017

Katherine Mudge
Smith Majcher & Mudge LLP
816 Congress Ave Ste 1270
Austin TX 78701

Bill Magness
Casey & Gentz LLP
919 Congress Ave Ste 1060
Austin TX 78701

James J Caplinger Jr
James M Caplinger
James M Caplinger Chtd
823 W 10th St
Topeka KS 66612

William Haas
McLeod USA Inc
6400 C St SW
Cedar Rapids IA 52406-3177

Stephen F Morris
WorldCom
701 Brazos Ste 600
Austin TX 78701

Katy Evans
Director of Regulatory Affairs
Central Region
Cox Communications
2312 NW 110th St
Oklahoma City OK 73107

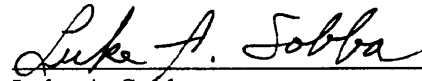
Glenda Cafer
Cafer Law Office LLC
Kaw Valley Bank Bldg
4848 SW 21st St Ste 201
Topeka KS 66604

Rebecca B DeCook
AT&T Law Dept
1875 Lawrence St 15th Flr
Denver CO 80202

Rose Mulvany Henry
Birch Telecom of Kansas Inc
2020 Baltimore Ave
Kansas City MO 64108

Lisa Creighton Hendricks
Sprint
6450 Sprint Parkway Bldg 14
Mail Stop KSOPHN0212-2A253
Overland Park KS 66251

Thomas M Koutsky
Z-Tel Communications Inc
1200 19th St NW Ste 500
Washington DC 20036


Luke A. Sobba

ATTACHMENT B

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Brian J. Moline, Chair
 John Wine
 Robert E. Krehbiel

COPY TO:

TSP
BAN
MNS
JA
D MGR

In the Matter of the General Investigation to)
Determine Conditions, Terms and Rates for) Docket No. 01-GIMT-032-GIT
Digital Subscriber Line Unbundled Network)
Elements, Loop Conditioning and Line Sharing)
_____)

**COVAD'S RESPONSE TO COMMISSION ORDER 21 SOLICITING A BRIEF
ON THE EFFECT OF THE FCC'S TRIENNIAL REVIEW ORDER**

On March 3, 2003, the Commission issued Order 21 requesting briefing from interested parties on selected issues presented by the Federal Communications Commission's ("FCC") *Triennial Review Order*.¹ This Commission's Order 21 specifically asked parties in this docket to file briefs on the effect of the FCC's *Triennial Review Order* on Commission Order 19 with regard to three issues: (1) the Commission's unbundling of an end-to-end broadband-capable loop over SWBT's Project Pronto DSL architecture; (2) the Commission's unbundling of packet switching in SWBT's Project Pronto DSL architecture; and (3) the Commission's requirement that SWBT provide splitters at the end of the transitional period as outlined in the *Triennial Review Order*. Covad Communications Company ("Covad") respectfully responds as follows:

¹ *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), rel. August 21, 2003.

RECEIVED

OCT 08 2003

**LEGAL DEPT.
TOPEKA, KANSAS**

I. The KCC Clearly Has the Power and Authority to Unbundle Access to SBC's Project Pronto DSL Architecture.

Under the authority of the Telecommunications Act of 1996 (the "Act"), the *Triennial Review Order* has vested state commissions with responsibility for determining the future of competition in the local telecommunications market. The future of competition will hinge upon the ability of competitors to provide bundled voice and data offerings to compete with SBC's bundled offerings. Currently, SBC maintains a monopoly stranglehold on bundled offerings to customers served by its Project Pronto DSL architecture. That is, SBC does not allow competitors to provide DSL service to customers served by SBC's Project Pronto DSL architecture, and therefore, competitors are precluded from offering these customers a bundled voice and data product. In order to ensure the future of competition in the Kansas market, this Commission must stand on its Order unbundling an end-to-end broadband UNE over SBC's Project Pronto DSL architecture, and its Order unbundling the packet switching capabilities within SBC's Project Pronto DSL architecture.² This is vitally important, as SBC has since withdrawn its voluntary offer to provide access to its Project Pronto DSL architecture pursuant to the Broadband Services Agreement previously examined by this Commission. As set forth in detail below, the KCC retains such unbundling authority pursuant to this Commission's independent state law authority, its authority under to § 706(a) of the Act, and its authority under Section 271 of the Act.

II. The KCC's Independent State Law Authority to Unbundle Hybrid Loops Is Preserved by the Act and Has Not Been Preempted by the FCC.

² Herein Covad will often refer simply to access to hybrid loops. Access to hybrid loops should be interpreted to include access to the packet switching capabilities within SBC's Project Pronto DSL architecture.

A. The KCC Has Independent State Law Authority to Unbundle Hybrid Loops.

As this Commission acknowledged in Order 19, the KCC has independent state law authority pursuant to the Kansas Telecommunications Act, K.S.A. 2001 Supp. 66-2001, to require SWBT to provide competitors with unbundled access to its Project Pronto DSL architecture.

The Commission concludes it continues to have authority pursuant to 47 U.S.C. § 251(d)(3) to decide interconnection issues presented by this docket. In this Order, the Commission's review does not conflict with federal law, but instead addresses the Circuit Court's criticism of the FCC orders while considering Kansas-specific circumstances presented by the parties in this docket. *Also, the Commission concludes that by deciding the issues in this docket it is fulfilling its obligations under K.S.A. 2001 Supp. 66-2001.* The Commission will use the FCC orders and regulations as guidance in evaluating the issues presented in this complex docket, but it will take into account the principles set out in *U.S. Telecom*. If, after this Order is issued, the FCC revises its requirements regarding the analysis a state commission should use in considering the issues in this docket, the Commission will not hesitate to conduct further evaluation as required by any newly adopted orders or regulations.³

Indeed, in a letter to the FCC, this Commission stated: "The KCC reached its decision based upon its obligation under the Kansas Telecommunications Act to promote competition among telecommunications carriers and the goal of the Federal Telecommunications Act to promote competition in telecommunications markets."⁴ The Commission's independent state law authority pursuant to the Kansas Telecommunications Act, K.S.A. 2001 Supp. 66-2001 survives the FCC's *Triennial Review Order*, and should be the basis for this Commission to affirm Order 19.

³ *In the Matter of the General Investigation to determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing*, Kansas Corporation Commission Docket No. 01-GIMT-032-GIT, Ordering 19: Decision on Digital Subscriber Line Services and Line Splitting, dated January 13, 2003, pp. 4-5.

Letter from KCC to FCC (Jan. 23, 2003)

B. The KCC's Independent State Law Unbundling Authority is Preserved by the Act.

It is beyond dispute that the authority granted to this Commission by the Kansas Telecommunications Act, K.S.A. 2001 Supp. 66-2001, is not preempted by the federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.⁵

Likewise, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations," states:

In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.⁶

Indeed, this Commission has previously recognized in Comments to the FCC that Section 251(d)(3) preserves the KCC's independent authority to unbundle network elements in addition to those unbundled by the FCC.

State Authority To Add New UNEs/Obligations: We agree with the FCC findings that § 251(d)(3) of the 1996 Act grants State commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of [§] 251. We believe Congressional intent as outlined in the 1996 federal statute, existing State enabling statutes,

47 U.S.C. § 252(e)(3).

47 U.S.C. § 251(d)(3).

and the FCC rules and prior findings in this and related dockets support this approach.⁷

Accordingly, the Act preserves this Commission's independent state law unbundling authority.

C. The KCC's Independent State Law Unbundling Authority Was Not Preempted by the FCC in its *Triennial Review Order*.

It is likewise beyond dispute that the authority granted to this Commission by the Kansas Telecommunications Act, K.S.A. 2001 Supp. 66-2001, is not preempted by the FCC's *Triennial Review Order*. Nor could it be. While the FCC has the authority to interpret the Act, it does not have the authority to re-write it. Indeed, any deference previously accorded to the FCC's interpretation of the Act under the *Chevron* doctrine (*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 387 (1984)) has long since been forfeited because the FCC's interpretation of the Act has been repeatedly reversed by the D.C. Circuit.⁸ Thus, notwithstanding any statements in the *Triennial Review Order*, the Act defines this Commission's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority.

Should this Commission place stock in the FCC's interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the

⁷ Reply Comments by the State Corporation Commission of the State of Kansas filed in the proceeding captioned: *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed July 16, 2002).

⁸ *MCI v. AT&T*, 512 U.S. 218, 229 (1994) (holding that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption:

Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.⁹

The FCC further acknowledges in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.¹⁰

Accordingly, the FCC has explicitly acknowledged that this Commission retains its independent unbundling authority.

1. The FCC Held that State Law Authority is Preserved Unless the Exercise of That Authority Would "Substantially Prevent Implementation" of Section 251.

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws unbundling orders:

Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime...

⁹ See *Triennial Review Order*, at ¶ 191

See *Triennial Review Order*, at ¶ 192.

[W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.¹¹

Based upon the Eighth Circuit's *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC's unbundling orders are not ipso facto preempted:

That portion of the Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).¹²

In sum, the FCC's *Triennial Review Order* confirms that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules is *insufficient* to create such a conflict. Rather, the FCC recognized that the state laws would not be subject to preemption unless they "substantially prevent implementation" of section 251.

2. The FCC Did Not Conclude That Any Existing State Commission Orders Unbundling Hybrid Loops Would "Substantially Prevent Implementation" of the Act or the FCC's Rules.

In its *Triennial Review Order*, the FCC did not preempt *any existing* state law unbundling requirements, nor did it act to preclude the adoption of *any future* state law unbundling requirements. This is significant because several states, including California and Minnesota, have exercised their independent state law authority to unbundle the

See Triennial Review Order, at ¶¶ 192, 194.

¹² *See Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

HFPL.¹³ In addition to Kansas, several states, including Illinois, Wisconsin, and Indiana, have exercised their independent authority to unbundle hybrid loops.¹⁴ The FCC declined to preempt this Commission's unbundling Order, or any of these unbundling orders, stating only that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation."¹⁵ Accordingly, the FCC specifically acknowledged that in many circumstances state law unbundling of hybrid loops would be consistent with the FCC's framework and would not frustrate its implementation.

Recognizing its ability to preempt state unbundling orders was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling hybrid loops were preempted. Rather, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders "substantially prevent implementation" of Section 251. Contrary to this standard, however, the FCC stated that it was "*unlikely*" that it would refrain from preempting a state law or Order that required the "unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national

¹³ **California:** CPUC Docket No. R.93-04-003/1.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077 (Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

¹⁴ **Illinois:** ICC Docket No. 00-0393; *Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; Investigation into Ameritech Wisconsin's Unbundled Network Elements (March 22, 2002); **Indiana:** IURC Cause Number 40611-S1, Phase II; *In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rate's for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001); **Kansas:** KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003).

See Triennial Review Order, ¶ 195.

basis.”¹⁶ While the FCC’s preemption analysis (or more accurately, its unsupported supposition) is flawed, it is important to note that even pursuant to this faulty analysis the FCC expressly refused to conclude that an order unbundling hybrid loops would be preempted as a matter of law, thereby signaling to state commissions that hybrid loops could be unbundled under particular circumstances.

3. State Law Access Requirements Are Valid “As Long as the Regulations Do Not Interfere With the Ability of New Entrants to Obtain Services.”

The proper analysis to determine whether state access laws impermissibly conflict with the federal regulatory regime is set forth in *Michigan Bell v. MCI Metro*, 323 F.3d 348 (6th Cir. 2003). In *Michigan Bell*, the Sixth Circuit Court of Appeals refused to preempt an Order of the Michigan Public Service Commission (“PSC”) (allowing MCI to transmit resale orders by fax pursuant to its Michigan tariff) which SBC argued “conflicted” with MCI’s tariff, and hence, the Act. Conducting its preemption analysis the Sixth Circuit first noted that the Michigan PSC’s authority was expressly preserved by the Act:

When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. *In fact, it expressly preserved existing state laws that furthered Congress’s goals and authorized states to implement additional requirements that would foster local interconnection and competition*, stating that the Act does not prohibit state commission regulations ‘if such regulations are not inconsistent with the provisions of [the FTA].’¹⁷

The Court then explained that “as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not

¹⁶ See *Triennial Review Order*, ¶ 195.

Michigan Bell, 323 F3d at 358.

preempted.”¹⁸ The Court later reiterated that an Order of the Michigan Commission would be affirmed provided that it “does not frustrate the purposes of the Act.”¹⁹ An order requiring unbundled access to Project Pronto under Kansas law would not prevent a carrier from taking advantage of the network opening provisions of the Act, nor would such unbundling frustrate the purposes of the Act. The Court unequivocally stated:

The Commission can enforce state law regulations, *even where those regulations differ from the terms of the Act* or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.²⁰

Accordingly, contrary to the FCC’s statement that it is “unlikely” that state laws requiring access to hybrid loops would escape preemption, it is clear that this Commission had and continues to have the authority to implement state law and require access Project Pronto under Kansas law because such orders would not interfere with the ability of new entrants to obtain services.

4. Contrary to its “Unlikely” Prediction, the FCC Acknowledges Unbundling Will Be Required Under Certain Circumstances.

Although the FCC stated that it was “unlikely” to refrain from preempting a state law unbundling access to hybrid loops, the *Triennial Review Order* broadly identifies the circumstances that would lead the FCC to decline to preempt a state commission order unbundling a network element that the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that “the availability of certain network elements may vary between

¹⁸ *Id.* at 359.

¹⁹ *Id.* at 361

²⁰ *Id.*

geographic regions.”²¹ Indeed, according to the FCC, such a granular “approach is required under *USTA*.”²² Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of section 251.

D. The KCC Has the Authority to Require SBC to Provide Access Project Pronto Consistent with Federal Law Based Upon Kansas-Specific Facts.

In its *Triennial Review Order* the FCC concluded that CLECs were impaired without access to hybrid loops. Nevertheless, the FCC declined to order ILECs to unbundle hybrid loops based upon two findings. First, the FCC invoked the authority of Section 706(a) to employ “regulatory forbearance” over hybrid loops, concluding that ‘applying section 251(c) unbundling obligations to these next-generation network elements [hybrid loops] would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities.”²³ Second, the FCC concluded that “the impairment competitive LECs face” without access to hybrid loops is addressed by “unbundled access to incumbent LEC copper subloops” and “TDM-based loops.”²⁴ As set forth below, this Commission is vested with authority pursuant to Section 706(a) to require unbundling of hybrid loops, and to conclude that the alternative broadband access cited by the FCC is

²¹ *Triennial Review Order*, ¶196.

²² *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427).

²³ *Triennial Review Order*, ¶ 288.

Triennial Review Order, ¶ 288.

insufficient to overcome “the impairment competitive LECs face’ without access to hybrid loops.

1. Unbundling Project Pronto Would Promote The Deployment Of Advanced Telecommunications Infrastructure in Kansas.

In attempting to justify its deregulation of hybrid loops the FCC cloaked itself in the authority conferred by Section 706(a) of the Telecommunications Act of 1996, which directs the FCC to “encourage the deployment” of advanced telecommunications services.²⁵ Yet in making its national finding the FCC blatantly ignored the express language of Section 706, which provides:

The Commission *and each State commission* with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁶

The FCC therefore took a statutory provision that expressly grants *state commissions* authority over broadband deployment, and used it to justify its attempt to grab exclusive jurisdiction over up to 50% of the loops in the country, deregulating those loops and purporting to eliminate the states’ ability to adopt their own loop deployment policies.

As such, the FCC’s interpretation of Section 706(a) is invalid on its face,²⁷ and will

²⁵ 1996 Act, § 706. The Commission posits that it gains its authority to preemptively deregulate fiber and packet facilities through § 706’s direction to encourage deployment of broadband services, in combination with § 251(d)(2)’s provision that, in defining UNEs, the commission must consider “at a minimum” the “necessary” and “impair” standards. *Triennial Review Order*, ¶¶ 234, 286, 288.

1996 Act, § 706(a) (emphasis added).

²⁷ Further proof of the Commission’s unprecedented jurisdictional power grab is found in another new jurisdictional theory that appears for the first time in the *Triennial Review Order*. In it, the Commission states that, when states undertake their nine-month proceedings to implement the new *Triennial Review Order* rules, they are doing so exclusively under federal authority that is delegated to the states *by the Commission*.” *Triennial Review Order*, ¶¶ 186-87.

compel reversal of the *Triennial Review Order's* deregulation of hybrid loops. Importantly, whether reversed or not, it is clear that Section 706(a) grants this Commission authority equal to that granted the FCC, and thus, confers upon this Commission equal authority to determine that unbundling hybrid loops will encourage the deployment of advanced telecommunications services.

i. "Regulatory Forbearance" Pursuant to Section 706(a) Is Not Necessary to Encourage Advanced Services Deployment by SWBT.

The evidence in this proceeding demonstrates that SWBT is legally obligated to deploy its Project Pronto DSL architecture "throughout SWBT's service area, even if additional investment in equipment and fiber is required to ensure availability of DSL service to all customers."²⁸ This commitment was confirmed by SWBT witness Carol Chapman, who confirmed that SWBT has made commitments to provide DSL in certain areas of Kansas.²⁹ Ms. Chapman was specifically asked whether SWBT would keep its commitment to deploy DSL if SWBT were ordered to provide unbundled access to its Project Pronto DSL architecture. Ms. Chapman responded that SWBT "will meet any commitments that we have already made to this Commission."³⁰ Accordingly, "regulatory forbearance" pursuant to Section 706(a) is unnecessary to encourage advanced services deployment.

²⁸ See *In the Matter of Investigation into Southwestern Bell Telephone Company's Cost to Provide Local Service, as required by K.S.A. 1996 Supp. § 66.2008(d)*, Docket No. 98-SWBT-677-GIT. Before the Kansas Corporation Commission, Order No. 24.

²⁹ TR. (Vol. 4) at p. 725, lines 19-24.

³⁰ TR. (Vol. 4) at p. 863, lines 16-18.

The evidence in this proceeding further demonstrates (1) that SWBT planned and initiated its deployment of its hybrid loop architecture at a time when it knew it was subject to unbundling requirements, and (2) that SWBT would deploy its hybrid loop architecture whether or not it was capable of delivering advanced services. Specifically, SWBT's Investor Briefing reflects that "The network efficiency improvements alone will pay for this initiative," and that deployment of Project Pronto will result in "Annual Savings of 1.5 Billion by 2004."³¹ Accordingly, the record is clear that SBC planned to deploy and will deploy Project Pronto in order to reap the tremendous financial efficiencies it has touted to its investors, regardless of any unbundling requirements.

ii. "Regulatory Forbearance" Pursuant to Section 706(a) Is Not Necessary to Encourage Advanced Services Deployment by CLECs.

There is little question that "regulatory forbearance" pursuant to Section 706(a) that results in denying CLECs access to SBC's Project Pronto DSL architecture will thwart CLEC investment in facilities-based advanced services. Furthermore, the record contains no evidence that denying CLECs access to hybrid loops will encourage such investment. In Kansas, collocation at remote terminals is vastly more expensive than collocation at central offices ("CO") due to the larger number of collocations and the diminishing access to customers per collocation arrangement. As this Commission has recognized, "In Kansas, each central office can serve up to 20 remote terminals. For example, Overland Park, Kansas, has four to six central offices and an estimated 50 remote terminals. . . . The time, money, and resources required for collocation are

See TR. (Vol. 3) at 549, Ex. 14 (attached).

prohibitive . . .”³² The Commission further concluded that with regard to SBC’s expenditure on Project Pronto: “None of the competitive LECs can match SBC’s expenditure. The competitive LECs have no legacy network to improve and no accompanying economies of scope and scale. . . . Therefore, no third-party providers of an end-to-end broadband capable loop are available.”³³ Under these cost constraints, there is little question that, in Kansas, far from using copper subloops to compete with SBC’s Project Pronto offering, competitors would simply refrain from competing at all for these primarily residential customers. This would directly result in a corresponding absence of investment in central office collocated facilities, local network packet switching capability, and backhaul network capacity. Thus, there is little question that in Kansas, the lack of an unbundling requirement for Project Pronto will lead to a corresponding lack of investment in facilities-based competition by CLECs. Moreover, this Commission has concluded that unbundling Project Pronto will increase, rather than decrease, CLEC investment in broadband facilities, stating:

Assuring the continuing availability of the end-to-end broadband capable loop will encourage competitive LECs to actively offer DSL in Kansas. If these competitors can establish a customer base and technology develops to allow alternative DSL offerings, this Commission believes that competitive LECs will invest in facilities to provide a variety of DSL offerings.”³⁴

2. “The Impairment Competitive LECs Face” Without Access To Hybrid Loops Is Not Addressed By “Unbundled Access To Incumbent LEC Copper Subloops” and “TDM-Based Loops.”

There is little question that in Kansas copper subloops and TDM-based loops are not true alternatives to unbundled access to packetized hybrid fiber-copper facilities. As

³² Order 19, at 23.

³³ Order 19, at 35.

³⁴ Order 19, at 48.

explained above, in Kansas, collocation at remote terminals is vastly more expensive than collocation at central offices due to the larger number of collocations and the diminishing access to customers per collocation arrangement. Furthermore, TDM transmission facilities, such as a DS1 loop, are not true substitutes for packetized broadband transmission facilities in Kansas. In Kansas, a UNE DS1 loop has a non-recurring charge and a monthly recurring charge that are significantly more expensive than the equivalent charges for a DSL loop. Clearly, consumers and home-based businesses cannot afford (and do not need) the higher cost DS1 services. TDM-based services offer symmetric services and service level guarantees more suitable to certain classes of business customers – not substitutes for SBC's mass market broadband offerings. Thus, unlike the FCC's national impairment finding, access in Kansas to copper subloops and TDM transmission facilities does not alleviate competitors' need for access to the unbundled packetized transmission capabilities of hybrid fiber-copper loop facilities.

Likewise, access to copper subloops is not a viable alternative to SBC's Project Pronto DSL architecture. The overwhelming evidence in the record demonstrates that access to subloops is not a feasible alternative because it would require CLECs either to collocate a line card in a SWBT's remote terminal, or to collocate a DSLAM at the remote terminal. As this Commission has acknowledged, SWBT has steadfastly refused to allow CLECs to collocate line cards in its RTs. RT collocation is limited by space constraints, is prohibitively expensive and takes considerable time to deploy. The cost of collocating in all or even at most RTs is prohibitive and would materially impair a CLEC's ability to provide xDSL-based services in Kansas. Thus, access to subloops is

not currently feasible, and thus not a viable alternative to CLEC access to end-to-end broadband loops configured over hybrid facilities.

Accordingly, for the reasons set forth above, the FCC's Triennial Review Order does not preclude this Commission from unbundling access to SBC's Project Pronto network architecture because this Commission is authorized by independent state law unbundling its independent policy making role in § 706(a) to conclude that CLECs are impaired without access to hybrid loops.

III. The KCC Has Authority Pursuant to Section 271 of the Act to Require SBC to Provide Unbundled Access to Project Pronto.

In addition to its authority to unbundle network elements under its independent state law unbundling authority, this Commission also has the authority to enforce the unbundling requirements of Section 271 of the federal Telecommunications Act. The FCC made clear in the *Triennial Review* that section 271 creates independent access obligations for the Regional Bell Operating Companies:

[W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.³⁵

Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.³⁶

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, as a Bell Operating Company SBC retains an independent statutory obligation

See Triennial Review Order, ¶ 653.

See Triennial Review Order, ¶ 655.

under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.³⁷ There is no question that SBC's network access obligations include the provision of unbundled access to loops under checklist item #4: "Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251."³⁸

In addition, the KCC has independent authority to enforce these section 271 BOC obligations. Specifically, K.S.A. 66-1,188 grants to this Commission "full power, authority and jurisdiction to supervise and control the telecommunications public utilities doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." Furthermore, SBC could not seriously argue that the KCC's enforcement of SBC's section 271 checklist obligations would "substantially prevent the implementation" of any provision of the federal Telecommunications Act. In fact, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized.³⁹ Indeed, the Act expressly preserves a state role in the review of a BOC's compliance with its section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a BOC's section 271 compliance.⁴⁰ Thus, the KCC clearly has

See 47 U.S.C. § 271(c)(2)(B).

³⁸ *See Triennial Review Order*, ¶ 654.

³⁹ *See Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *See De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S.Ct. at 1217).

⁴⁰ *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing BOC compliance with the 271 checklist).

the authority to enforce SBC's obligations to provide unbundled access to loops under Section 271 checklist item #4.

A. The Commission Has the Authority Under Section 271 to Require SBC to Provide Access to Hybrid Loops.

It is evident that the broadband transmission capabilities of hybrid fiber-copper loops meet the section 271 checklist item 4 definition of "local loop transmission from the central office to the customer's premises, *unbundled from local switching or other services.*"⁴¹ Thus, the packetized transmission capability of hybrid fiber-copper loops is clearly a form of loop transmission that the Bells themselves routinely use to provide xDSL services separately from narrowband voice services. The only difference is that, with hybrid fiber-copper loops, the medium used to provide this loop transmission includes fiber as well as copper, as opposed to simply copper.

The section 271 checklist, however, is not medium-specific requirement for loops made of copper alone. Rather, the statutory checklist applies simply to "local loop transmission" – without regard to the medium used to provide such transmission (whether it be copper, fiber, wood, rubber, or another yet to be discovered medium), and without regard to the electrical or logical characteristics of such transmission. Indeed, since the earliest 271 proceedings, the FCC has routinely analyzed BOC compliance with the 271 checklist by examining BOC performance with respect to providing unbundled access to loops without regard to whether such loops are provided over pure copper or hybrid fiber-copper loop facilities – including digital loops such as ISDN loops, DS1 loops, and DS3 loops, all of which are routinely provisioned over both all-copper and

⁴¹ See 47 U.S.C. § 271(c)(2)(B)(iv).

hybrid fiber-copper facilities.⁴² Furthermore, whether or not these transmission capabilities are provided in a packetized format is irrelevant to an analysis of the BOC's section 271 compliance. Rather, the only relevant criterion is whether the BOC provides loop transmission capability to competitors in a non-discriminatory manner – in other words, whether the BOC provides the same transmission capability, in the same time and manner that it routinely provides to itself or its own affiliate. There is no question that SBC does in fact routinely provide itself access to the packetized transmission capabilities of their hybrid fiber-copper loops.

Furthermore, as discussed above, the fact that the FCC has concluded that competitors are not entitled nationally to access the packetized transmission capabilities of hybrid fiber-copper loops *as UNEs from incumbent LECs* under section 251(c)(3) and section 251(d)(2) is irrelevant to the analysis of whether competitors retain the right to such access as *unbundled loop transmission from BOCs* under section 271 checklist item 4. As explained above, the FCC's *Triennial Review Order* expressly recognized that SBC's facilities, including loop facilities, would remain subject to section 271's unbundling requirements notwithstanding the FCC's impairment and unbundling determinations with respect to UNEs under section 251(c)(3) and 251(d)(2). Indeed, the BOCs themselves have sought relief from this separate section 271 unbundling requirement in the form of a forbearance petition before the FCC – belying any claim they might make here that such a requirement does not exist.⁴³

⁴² See, e.g., *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, at paras. 273-336.

⁴³ See *Verizon Petition for Forbearance of the Verizon Telephone Companies Pursuant to Section 160(c)*, CC Docket 01-338 (filed July 29, 2002).

IV. SWBT Must Provide Competitors the Same Access to Project Pronto that It Provides to Its Advanced Services Affiliate, ASI.

Pursuant to the nondiscrimination provisions in both Kansas and federal law, SWBT is required to provide nondiscriminatory access to its network and facilities. Section 251(c)(3) requires the ILECs “provide, to any requesting telecommunications carrier for the provision of a telecommunications service, *nondiscriminatory access* to network elements on an unbundled basis [UNEs] at any technical feasible point on rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*.”⁴⁴ In determining whether particular elements should be made available on an unbundled basis, regulators “shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”⁴⁵ Likewise, Section 202(a) of the Communications Act of 1934 states:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.⁴⁶

Similarly, the Kansas Telecommunications Act provides:

A local exchange carrier shall be required to offer to allow reasonable resale of its retail telecommunications services and to sell unbundled local loop, switch and trunk facilities to telecommunications carriers, as required by the federal act, and pursuant to negotiated agreements or a statement of terms and conditions generally available to telecommunications carriers.

⁴⁴ 47 U.S.C. § 251(c)(3).

⁴⁵ 47 U.S.C. § 251(d)(2)(B).

⁴⁶ 47 U.S.C. § 202(a).

K.S.A. 66-2003(b). Additionally, K.S.A. 66-1,189 prohibits unreasonably discriminatory practices by telecommunications public utilities. Clearly, nondiscriminatory access requires that SBC provide all carriers, CLECs and its advanced services affiliate alike, access to its Project Pronto DSL architecture at the same rates, terms, and conditions. The evidence in this proceeding demonstrates that SBC provides ASI with access to Project Pronto. Accordingly, it is beyond dispute that CLECs are also entitled to access upon the same rates, terms and conditions. Thus, the Commission must enforce the non-discrimination provisions of the federal and Kansas Telecommunications Acts and require SWBT to provide CLEC access to hybrid loops.

V. SWBT Must Continue to Provide Splitter Access Beyond the FCC's Transition Period Pursuant to Its Continuing Obligation to Provide Access to the HFPL.

SBC is obligated to provide CLECs with access to SBC-owned splitters for so long as SBC is obligated to provide CLECs with access to the HFPL. Notwithstanding the determination by the FCC's to phase out the ILEC's obligation to provide HFPL access pursuant to Section 251, SWBT remains obligated to provide Kansas CLECs with access to the HFPL pursuant to the Kansas Telecommunications Act and Section 271 of the federal Telecommunications Act. Accordingly, SWBT remains obligated to provide CLECs with access to SWBT-owned splitters.

A. SWBT Is Obligated to Provide Access to the HFPL Pursuant to the Kansas Telecommunications Act.

This Commission has previously acknowledged its independent authority under Kansas law to require SBC to provide competitors with access to the HFPL pursuant to the Kansas Telecommunications Act, K.S.A. 2001 Supp. 66-2001. As this Commission has found:

In light of the U.S. Telecom decision [vacating the FCC's Line Sharing Order which provided unbundled access to the HFPL], this Commission concludes it should make an independent decision regarding whether SWBT should be required to provide access to the HFPL. . . . [T]he Commission is charged with ensuring that consumers throughout the state "realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates." The Commission must also promote access to all consumers "to a full range of telecommunications services, including advanced telecommunications services that are comparable in urban and rural areas throughout the state." K.S.A. 2001 Supp. 66-2001(c). . . . To achieve the goals of K.S.A. 2001 Supp. 66-2001, and to promote the continued growth of competition in the telecommunications market in Kansas, this Commission concludes it is critical to allow competitive LECs access to the HFPL where ASI has that access.⁴⁷

Accordingly, SWBT remains obligated to provide HFPL access, and hence splitter access, even after the transition period discussed in the FCC's *Triennial Review Order*.

B. SWBT Is Obligated to Provide Access to the HFPL Pursuant to Section 271 of the Act.

Although the FCC concluded in its *Triennial Review* that competitors are not impaired without unbundled access to the HFPL pursuant to section 251(c)(3) of the Act, the FCC acknowledged that section 271 creates separate, statutory HFPL unbundling obligations for the Bells, wholly separate and apart from the statutory unbundling obligations in section 251. SBC cannot deny that section 271 checklist item 4 requires the Bells to provide access to the HFPL. By its plain language, checklist item 4 requires the Bells to provide access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."⁴⁸ The HFPL is clearly a form of loop transmission—a loop transmission that SBC itself routinely uses to

⁴⁷ KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003) (citing K.S.A. 2001 Supp. 66-2001).

⁴⁸ See 47 U.S.C. § 271(c)(2)(B)(iv).

provide xDSL services separately from narrowband voice services.⁴⁹ In light of this clear statutory language, there is no question that SBC remains under a statutory obligation to offer unbundled HFPL loop transmission to competitors, notwithstanding the FCC's finding of no impairment pursuant to section 251

Each time the FCC has reviewed a 271 application since the advent of line sharing the FCC has insisted the BOC long distance applicant offer non-discriminatory access to the HFPL in order to comply with checklist item #4.⁵⁰ To this day, months after its decision to eliminate HFPL access as announced in its February 20, 2003 press release, the FCC continues to look at the non-discriminatory availability of line sharing as an integral component of its checklist item #4 analysis in section 271 proceedings.⁵¹ The significance of this point cannot be overstated. The FCC required Qwest, the BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item #4 of section 271 more than a month after the FCC voted to eliminate line sharing (the HFPL) as a UNE.⁵² Indeed, after the Triennial Review Order has been issued, the FCC still required SBC Michigan to demonstrate that it provides nondiscriminatory access to the HFPL in

⁴⁹ In other words, SBC customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

⁵⁰ See, e.g., *Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶ 214-219 (2001).

⁵¹ See *Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, Memorandum Opinion and Order, WC Docket No. 03-90, FCC 03-142, para. 53, and App. C, ¶¶ 50-51.

⁵² See *id.* at ¶

order to obtain Section 271 approval.⁵³ There is simply no question that the Act, and the FCC, require SBC to provide non-discriminatory access to the HFPL if SBC desires to provide long distance services. Therefore, so long as SWBT continues to provide long distance service in Kansas, it remains obligated to provide CLECs with access to the HFPL, and accordingly, access to a SWBT-owned splitter.

VI. The KCC Clearly Has the Power and Authority to Unbundle Access to SBC's Project Pronto DSL Architecture.

Covad respectfully submits that it has demonstrated, beyond credible refutation, that this Commission has the statutory authority to grant competitors unbundled access to SBC's hybrid loops. Kansas-specific laws and Kansas-specific facts oblige this Commission to require unbundled access to this element that is essential to break SWBT's monopoly and provide competitors the ability to provide Kansas consumers bundled voice and data products. Covad need not remind the Commission of the importance of competition to the broadband adoption in Kansas:

The KCC believes that competitive pressure is critical to further spur the adoption of broadband services by consumers, both in Kansas and across the nation. As of December 31, 2001, 13% of Kansas households subscribed to some type of high speed data service. Competitive DSL service providers report serving 15,460 access lines in Kansas as of December 31, 2001, while SBC-KS, through its data affiliate ASI, serves 24,484 access lines. Removal of a state's flexibility to add line sharing to the list of UNEs could deal a fatal blow to the remaining competitive DSL providers, reduce the availability of benefits of broadband competition to consumers, reduce the degree of innovation in the broadband market, and increase the price that consumers must pay for broadband access.⁵⁴

⁵³ See *In the Matter of Application by SBC Communications, Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Service in Michigan*, Memorandum Opinion and Order, FCC 03-228, rel. September 17, 2003.

⁵⁴ Written Ex Parte Comment of the Kansas Corporation Commission, Electronically filed in the proceeding captioned: *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 and 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) (filed Jan. 23, 2003).

Covad appreciates the opportunity granted by this Commission to submit this Brief, and is confident that this Commission will affirm its Order unbundling access to SBC's Project Pronto DSL architecture, providing Kansas telecommunications consumers the benefits of competition—better services and lower prices.

Respectfully submitted,

William J. Cobb III
Senior Counsel
COVAD COMMUNICATIONS COMPANY
100 Congress Avenue, Suite 2000
Austin, Texas 78701
Telephone: 512 469-3781
Facsimile: 512 469-3783
E-Mail: bcobb@covad.com




Michael Lennen, KBA #08505
MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chartered
300 North Mead, Suite 200
Wichita, Kansas 67202-2722
Telephone: 316 262-2671
Facsimile: 316 262-6226
E-Mail: mlennen@morrislaing.com

Luke A. Sobba, KBA #20812
MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chartered
800 SW Jackson, Suite 1310
Topeka, Kansas 66612-2214
Telephone: 785 232-2662
Facsimile: 785 232-9983
E-Mail: lsobba@morrislaing.com

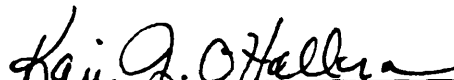
STATE OF KANSAS)
) ss:
SEDGWICK COUNTY

MICHAEL LENNEN, of lawful age, being first duly sworn on oath, states:

That he is one of the attorneys for Covad Communications Company; that he prepared the above and foregoing Response and knows the contents thereof, and that the statements contained therein are true.

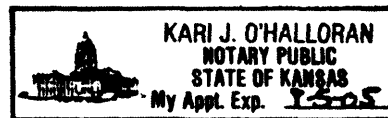

Michael Lennen

SUBSCRIBED AND SWORN to before me 6th day of October, 2003.


Notary Public

My appointment expires:

8-5-05



CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2003, the foregoing Response was filed by facsimile transmission with:

**SUSAN K. DUFFY, Executive Director
KANSAS CORPORATION COMMISSION
at 785 271-3354;**

that the original and seven copies were sent via U. S. Mail, postage prepaid, to:

**SUSAN K. DUFFY, Executive Director
KANSAS CORPORATION COMMISSION
1500 SW Arrowhead Rd
Topeka KS 66604;**

and that one copy was mailed to each of the following counsel or parties of record:

**Bob Lehr
Bret Lawson
Kansas Corporation Commission
1500 SW Arrowhead Rd
Topeka KS 66604**

**David Springe
Niki Christopher
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Rd
Topeka KS 66604**

**William J Cobb III, Senior Counsel
Covad Communications Company
100 Congress Ave., Ste 2000
Austin TX 78701**

**Rhonda Compton
Director Regulatory Affairs
SBC Advanced Solutions Inc.
300 Convent Rm 18-B1
San Antonio TX 78205**

**Michael J. Jewell
AT&T Communications
of the Southwest
919 Congress Ave Ste 900
Austin TX 78701**

**Frank A. Caro, Jr.
Polsinelli, Shalton & Welte
6201 College Blvd. Ste 500
Overland Park KS 66211**

**Rose M. Mulvany Henry
Birch Telecom of Kansas Inc
2020 Baltimore Ave
Kansas City MO 64108**

**Penny Bewick
New Edge Network Inc
3000 Columbia House Blvd Ste 106
Vancouver WA 98661**

Howard Siegel
Vice President of Regulatory Policy
IP Communications Corp
502 West 14th St
Austin TX 78701

Robert A Fox
Foulston & Siefkin LLP
One Amvestors Pl
555 S Kansas Ave Ste 101
Topeka KS 66603-3423

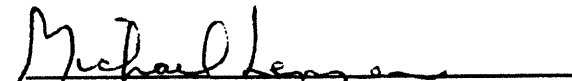
Rina Y Hartline
Birch Telecom of Kansas Inc
502 W 14th St
Austin TX 78701

Dale Dixon Jr
Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2300
Portland OR 97201

David Stueven
Directory of Regulatory for
Kansas, Missouri and Oklahoma
IP Communications Corp
6405 Metcalf Ste 120
Overland Park KS 66202

Bruce A Ney
Southwestern Bell Telephone Co
220 E 6th St Rm 515
Topeka KS 66603-3596

Lisa Creighton Hendricks
Sprint
Mail Stop KSOPHN0212-2A253
6450 Sprint Parkway Bldg 14
Overland Park KS 66251


Michael Lennen



October 18, 1999

No. 211

SBC Announces Sweeping Broadband Initiative

First major post-merger initiative involves planned \$6 billion investment over three years

On October 18, 1999, SBC announced its first major initiative from the merger with Ameritech. The initiative, called Project Pronto, involves the company's entire 13 state in-region territory, and is designed to transform SBC into a broadband service provider capable of meeting all customers' needs for data, voice and video products. SBC plans to invest more than \$6 billion over the next three years in fiber, electronics and ATM technology in order to create a robust, comprehensive, data-centric broadband network architecture.

This initiative will dramatically improve SBC's cost structure, while greatly expanding the company's ability to deliver broadband services to all its customers.

SBC's broadband initiative is much more than a local loop or DSL strategy. These investments will make broadband the standard for SBC's network, fundamentally changing the way the company operates. In addition, the investments will position SBC to effectively and efficiently capitalize on changes in technology, as well as changes in customer demand.

The time is right to make these significant investments. The performance of broadband technologies has improved dramatically while the associated

"The network efficiency improvements alone pay for this initiative, leaving SBC with a data network that will be second to none."

costs have declined. Customer demand for broadband services is real and growing rapidly. Cumulatively, these factors present SBC with a compelling business opportunity. The network efficiency improvements alone will pay for this initiative, leaving SBC with a data network that will be second to none in its ability to satisfy the exploding demand for broadband services. This new network structure, combined with SBC's partnership with Williams Communications — which is the nation's newest, most advanced long-distance network — enables

the company to deliver end-to-end broadband services locally, throughout its markets, and to the 30 out-region markets SBC plans to enter.

\$6 Billion Network Investment

Of the \$6 billion that SBC plans to invest over the next three years, 75 percent will be directed toward improvements to the basic local loop infrastructure (i.e., fiber feeder and next-generation remote terminals). The remaining 25 percent will fund other infrastructure improvements, especially in the tandem and interoffice network. Upon completion, SBC's next-generation network will be capable of meeting customers' voice, data and video needs with the right technology, at the right speeds and with the right reliability.

SBC's new network architecture is designed to be optimum from both a voice and data perspective. It will be scalable, with the capability to manage the ongoing shift in voice and data traffic volumes. Voice traffic today is predominantly circuit switched,

but this network deployment will give SBC the flexibility to readily move to other voice protocols, including voice over ATM, voice over ADSL and, ultimately, voice over IP. Data traffic will be diverted from the circuit-switched network, packetized and adapted to Internet Protocol. This approach to voice and data traffic will allow SBC to fully utilize the capacity of the existing circuit-switched network, while focusing ongoing capital expenditures on data capabilities.

Project Pronto Highlights

- \$6 billion capital investment
- Annual savings of \$1.5 billion by 2004
- Capital and expense savings pay for initiative on NPV basis
- \$3.5 billion in new revenue by 2004
- 100 basis-point improvement in annual revenue growth
- Significant value creation, well in excess of \$10 billion NPV

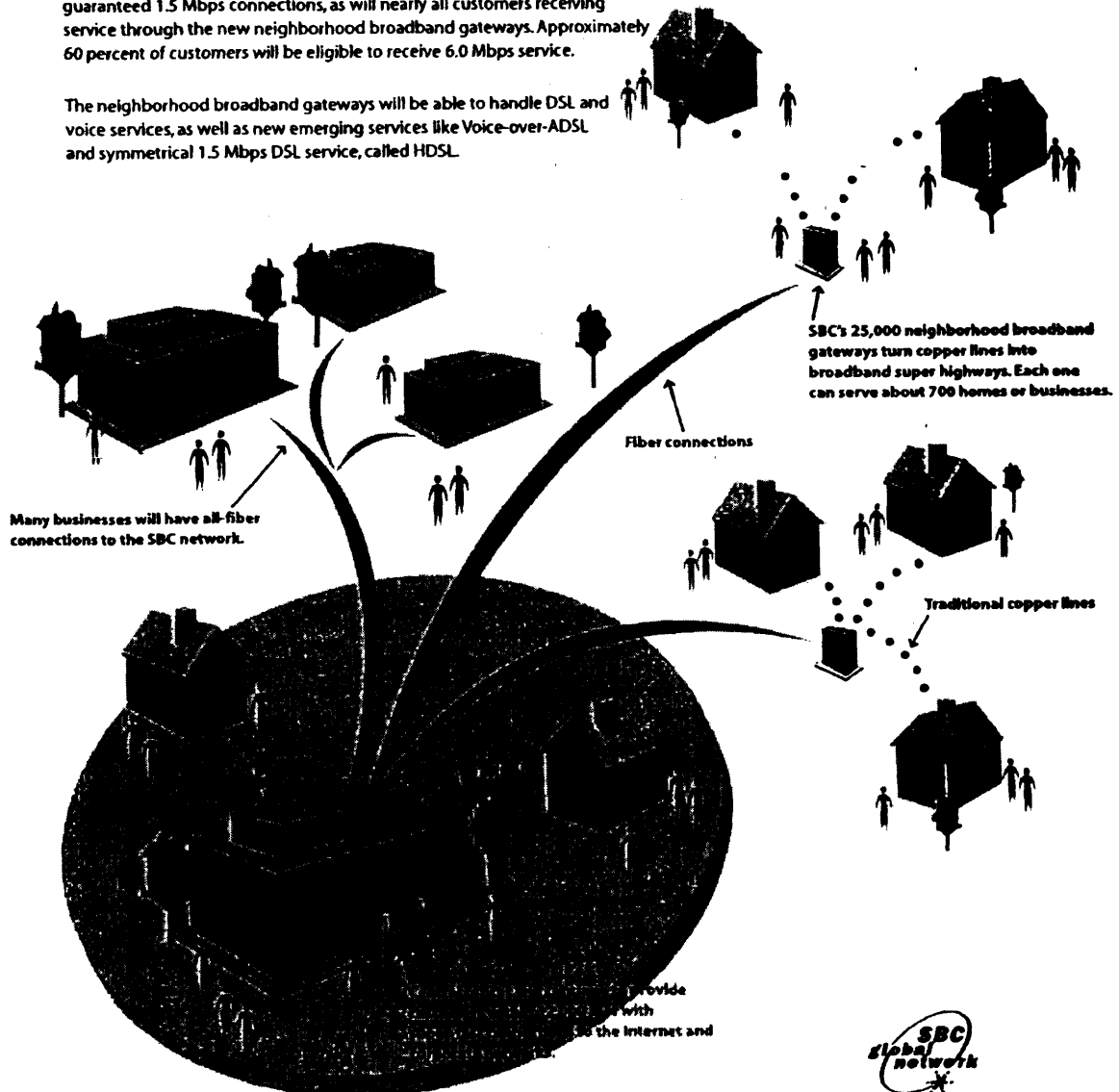
The higher speeds afforded by these network improvements will enable SBC to offer a myriad of Internet-based video products — including video streaming and video conferencing — on its landline networks. These network improvements also will allow SBC

SBC's New Broadband Neighborhood Network

SBC will deploy fiber deeper into neighborhoods and equip them with neighborhood broadband gateways, putting network capabilities closer to customers and making super-fast Internet access widely available.

Customers within 12,000 feet of a central office facility will receive guaranteed 1.5 Mbps connections, as will nearly all customers receiving service through the new neighborhood broadband gateways. Approximately 60 percent of customers will be eligible to receive 6.0 Mbps service.

The neighborhood broadband gateways will be able to handle DSL and voice services, as well as new emerging services like Voice-over-ADSL and symmetrical 1.5 Mbps DSL service, called HDSL.



to provide television entertainment as the technology evolves and becomes financially feasible to implement. SBC will also have the flexibility to continue to offer video and Internet services using satellite transmission through its strategic marketing and distribution agreement with DIRECTV™.

Loop Infrastructure

SBC plans to invest approximately \$4.5 billion to initially extend the reach of broadband capability to more than 80 percent of its customer base. SBC estimates that this deployment will immediately enable at least 60 percent of its broadband customer base to have guaranteed download speeds of six megabits per second (Mbps), with the remainder having guaranteed speeds of 1.5 Mbps or more. Further improvements in these speeds are expected as technology advances.

To achieve this kind of broadband penetration, SBC will place or upgrade approximately 25,000 remote terminals at an average cost of approximately \$86,000 each. These next-

generation remote terminals are also referred to as "neighborhood broadband gateways." Fiber backbones will be deployed to connect these neighborhood broadband gateways to about 1,400 central offices throughout SBC's 13-state territory. Fiber, as well as costs for systems and other requirements, is estimated to average about \$1.7 million per central office.

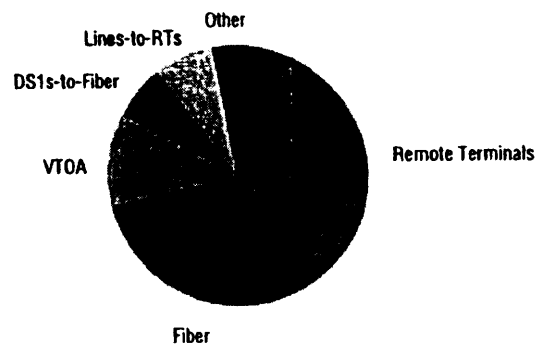
The deployment of fiber and next-generation remote terminals will enable SBC to overcome loop-length and line condition limitations in its network. While one immediate advantage of this deployment is the broader availability of ADSL, it also gives SBC the flexibility to react efficiently and effectively to

continuing technological improvements and market developments. Planning includes deployment scenarios for VDSL or APON (ATM Passive Optical Network) technology to address customers' television entertainment needs, as these platforms become technically and financially feasible.

Other Network Infrastructure

SBC intends to spend an additional \$1.8 billion to upgrade other portions of its network in order to improve efficiency. Forty percent of this investment is targeted for a technology that SBC is pioneering called Voice Trunking over ATM, or VTOA.

Network Infrastructure Capital Spending
(Breakdown of \$6 billion capital investment)



New Broadband Products

HDSL: A symmetrical 1.5 Mbps DSL service that is ideally suited for video conferencing or collaborative computing.

Access Advantage Plus: Provides a router with DSL or DS3 channelized service allowing the integration of voice and data on one single facility. The DSL service provides up to 24 DS0 channels to which a menu of products can be connected. The DS3 service provides up to 28 DS1 channels to which a menu of products can also be connected.

Switched Virtual Circuit (SVC): A capability for ADSL subscribers that enables the user to accommodate multiple connections on the personal computer. Users can establish a connection to an Internet Service Provider as well as a connection to a corporate LAN without having to change the PC software configuration and reboot the PC.

Voice Over ADSL (VoDSL): Expands on existing DSL service capabilities by providing up to 4 derived voice channels over the ADSL line and primary PoE line. VoDSL will provide a solution for our customers' current and future integrated voice and data needs. VoDSL will offer simplicity, flexibility, convenience and cost savings. In addition to these customer realized service benefits, VoDSL will provide potential infrastructure benefits that should enable SBC to reduce operations costs and improve its ability to scale and manage network services.

Splitterless DSL: Provides a full rate DSL service where the customer would receive a drop shipment and self-install the equipment. The equipment would consist of a modem, NIC card and filters. The filters would be customer installed in-line, low-pass microfilters for each analog device. The purpose is to filter out high-frequency signals so that both the voice and data can share common inside wiring. Splitterless DSL would eliminate the need for a technician to install a splitter and the inside wire. It also eliminates the need for the customer to have the CPE installed by a technician.

G.Lite: A technology that utilizes a new international standard for use with DSL services. The use of G.Lite technology as part of SBC's ADSL offering may reduce the complexity of an on-site installation by eliminating the need for new wiring and a special signal "splitter" that separates voice and data at the user's home. G.Lite technology does, however, require the use of customer installed filters at each telephone and analog device, such as answering and fax machines. This is referred to as "plug and play" consumer installation.

VPOP-Dial Access Service (VPOP-DAS): A cost-effective solution to modem pooling. VPOP-DAS provides for the termination of calls and interconnection to the SBC network of Data Service Providers (DSPs). SBC owns, maintains and monitors the modems and associated equipment. Dial Access Service allows SBC's Data Service Provider customers to receive multiple calls from end-users with analog and ISDN lines, transport data traffic to single location via SBC Frame Relay service, and avoid deployment of DSP-owned modems and related equipment.

Traffic Aggregation Services (TAS): Provides a complete transport solution to ISPs or businesses that are interested in purchasing volume DSL and VPOP-DAS. This service provides the customer increased flexibility to delineate groups of customers while making it easier to manage hundreds/thousands of incoming DSL/VPOP-DAS connections. Service components of TAS are:

- Aggregate DSL subscribers and deliver them over ATM using L2TP tunneling or Virtual Circuits to identify specific subscribers.
- Aggregate subscriber traffic (DSL, VPOP-DAS and FR) from multiple LATAs so that an ISP or business customer needs only one connection to SBC's nationwide network. This will be handled via a complementary carrier of the customer's choice.
- Customized solutions to customers' unique needs including specialized tunneling arrangements and CPE installation/maintenance for telecommuting applications.

ATM Circuit Emulation Service (CES): An enhancement to SBC's Cell Relay networking family of products that allows customers with existing or planned Primary Rate ISDN (PRI) or Super Trunk circuits to emulate and aggregate those circuits with their ATM traffic. As ATM is essentially a packet rather than a circuit-oriented transmission technology, it must emulate circuit characteristics in order to provide good support for Constant Bit Rate (CBR) circuit traffic. ATM CES provides customers with the capability of directly connecting standard Time Division Multiplexing (TDM) circuit traffic over the ATM network. Customers also have increased flexibility, efficiency and cost savings resulting from aggregating voice and data traffic with their ATM traffic. And, ATM CES allows customers to maintain their TDM investment while migrating their dedicated circuits with TDM traffic onto the ATM network. They can introduce ATM technology gradually without isolat-

ing or standing sites with substantial TDM investment.

Virtual Point Of Presence (VPOP-EES Service): Allows Internet Service Providers (ISP) to establish virtual POP locations in any region for EASYwide transport of dial-up Internet traffic. Traffic from multiple areas can be aggregated onto single ATM connections. Even Frame Relay traffic can be converted to ATM using the FRATM Service Interworking (FRATM SI) Enhancement.

Enterprise VPN: Enables large and medium business customers to establish a Virtual Private Network (VPN) via the SBC Internet Protocol (IP) network. EVPN is differentiated from traditional Internet access by enhanced security and performance guarantees. Standard features include:

- Dedicated or Dial Access Customers have the option of accessing the service through a Frame Relay, ADSL or private line connection (56Kbps — 622Mbps) or via dial access using an analog modem or an ISDN connection.
- EVPN Service Backbone provides for a shared wide-area IP routed network backbone with a core that is based on SONET and ATM.
- Performance Level Guarantees are higher than those in the public Internet.
- Enhanced Security accomplished with firewalls, tunneling and encryption, delivering better security than available via today's Internet.
- Options available include network hosted applications, LAN support and Desktop communications and applications support.

Online Office: Targets medium and small businesses with packages of:

- **EVPN** — The EVPN service as described above for customers with multiple sites.
- **Network Hosted Applications** — A suite of network hosted applications. Initially, network hosted applications in the package will include web hosting and e-mail. Subsequent applications will include E-commerce, calendar and scheduling, salesforce automation and other business software (e.g., accounting, human resources).
- **LAN Support** — LAN installation, maintenance and repair in support of an end-to-end service.
- **Desktop Support** — Support for the communications aspects of the desktop computer and for the Online Office applications.
- **Options Available** — Desktop applications support.

VTOA involves the scheduled and sequenced replacement of standard circuit-switch tandems with packet-based ATM switches within the core of the network. It's one of the first technologies being planned for wide deployment in order to make convergent voice and data networks practical. SBC intends to begin field trials in 2000 in Houston and Los Angeles.

Once the trials prove successful, the ensuing deployment would be one of the largest of its type. The convergence of voice and data backbones will significantly increase network efficiency and scalability by allowing SBC to transport voice traffic the same way as data — via packets — and with the same level of call quality

and reliability that SBC provides today.

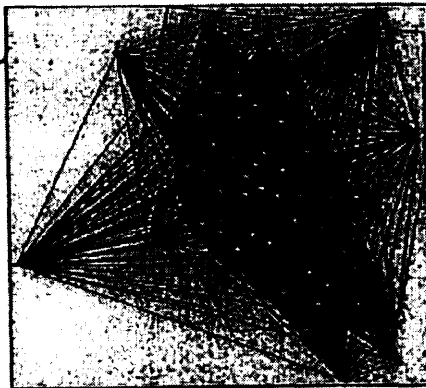
TRI, the company's research-and-development arm, has been testing VTOA exhaustively under real-life conditions. Their extensive analysis of SBC's Houston network, for example, revealed that the transition to VTOA should reduce the number of tandem switches required from four to one, resulting in a 74-percent reduction in trunk groups.

The company expects to convert 34 of 109 existing tandems to ATM-distributed tandems. Implementing VTOA also would enable SBC to avoid the forecasted deployment of 21 additional tandems in the next seven to 10 years.

Other infrastructure investments are planned to improve network efficiency. One-fourth of the \$1.8 billion targeted for network efficiency initiatives will be dedicated to upgrading a significant number of locations currently served via copper-based DSIs to new, lower cost fiber facilities. Another 25 percent will be targeted for moving existing

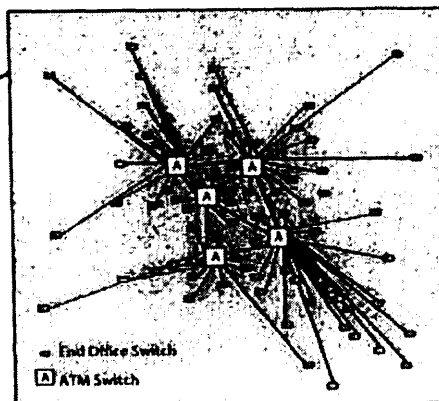
Houston Network Present VTOA

4 tandems
Approximately
500K trunks
76 end offices
2,700 trunk
groups



Houston Network Future VTOA

2003
1 VTOA tandem
Approximately
464K trunks
76 end offices
700 trunk
groups



voice lines to new fiber-fed remotes. The remaining 10 percent will be targeted for upgrading the overall condition of the network.

Cost Structure of Network

SBC's new network investments will have a profound impact on its cost structure; in fact, the efficiencies SBC expects to gain will pay for the cost of the deployment on an NPV basis. These efficiencies are conservatively targeted to yield annual savings of about \$1.5 billion by 2004 (\$850 million in cash operating expense and \$600 million in capital expenditures)

Expense Savings

The new loop infrastructure, with the additional dedicated feeder capacity the fiber provides, will substantially reduce the need to rearrange outside plant facilities when installing new or additional services. By avoiding dispatches on many installations, SBC expects to realize efficiencies in its installation and maintenance operations. Other anticipated efficiencies will

come from reduced activity required in the remaining copper plant because of improved reliability. A fiber-based distribution network is expected to be less vulnerable to weather conditions, thereby reducing trouble reports.

In some cases SBC is making investments in new technologies to dramatically reduce the cost of supporting future growth. A good example is the company's plan to move most of its copper-based DSIs to fiber at certain locations. With the fiber in place, the cost of providing additional bandwidth via electronics will be significantly less than adding more copper lines. Reducing the number of copper-based DSIs has the added benefit of eliminating a source of interference, which will make more the remaining copper-based facilities available for DSL service. In other cases, such as the plan to replace existing circuit-switched tandems with new fast packet technologies, costs associated with future growth as well as maintenance expenses will be reduced.

Capital Savings

Savings in capital expenditures for feeder, trunking and provisioning are targeted as a result of the network investments. Reduced spending on feeder facilities represents 70 percent of the targeted capital savings. The broad deployment of fiber and related electronics will substantially eliminate further deployment of copper facilities for feeder reinforcement. The balance of the capital savings comes from the reduced need for trunking capital, from lower provisioning costs for high-growth services, such as DSIs, and from other improvements in the distribution plant.

Revenue Opportunity

SBC expects its broadband initiative to dramatically improve its ability to deeply penetrate the growing market opportunity for broadband services, especially in the consumer and small and medium business markets. DSL services alone are targeted to add approximately \$3 billion to annual revenue within the next five years,

with another \$1.00 billion in telecom services, including and from other placements, primarily in broadband services that include product. This billion-dollar investment will be a successful work in revenue opportunity representing an additional 100 basis points of growth by 2004, free of concerns regarding

The fiber feeder network and extension

terminals designed length and network radii limitations allowing SBC to

objective of bringing broadband capabilities substantially of reach to all of locations beginning

2002

million customer locations with broadband service year

The ability to offer remote broadband service to customers is difficult to achieve. Network congestion will limit the need to "qualify" for D

making, nationwide promotions effectively

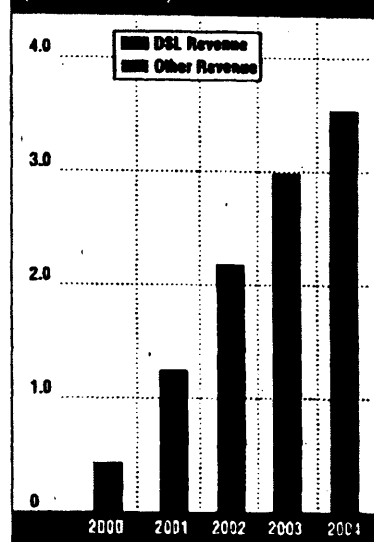
Likewise, SBC that broadband will be an important part of unmet

urban markets. SBC goal is to achieve at least 10 percent share of the total broadband market penetration. (The broadband market defined

portion of SBC locations where the typical landline-based broadband services from SBC are available. By 2004, SBC

expects market penetration to be approximately 30 percent, that is, slightly less than one-third of the total broadband capable population will subscribe for broadband service. SBC expects that the broadband market and market penetration will grow to at least half of the customer locations equipped with broadband capabilities within the next few years. The growth of the broadband market and SBC's objective

Revenue Opportunity
(Dollars in billions)



which represents 10 percent of this market. Penetration implies DSL subscriber base of 10 million by 2004, and more than 10 million before

With this architecture, a 10-Mbps service will be initially available to 60 percent of the broadband market. And, HD (a 10-Mbps symmetrical product) will be available to customers reaching with this architecture. These two new

estimated accounts for about 10 percent of the total projected DSL demand. The revenue opportunity for other products, including leased video conferencing

encing, remote management, web hosting and server hosting represent additional revenue opportunity.

SBC is also targeting at least an additional \$500 million net revenue opportunity by 2004 from other new or replacement products. These products include switched virtual circuit, voice over DSL, and VPOP-DAS (see page 5 for details on these and other products). SBC's new network architecture and its broadband capabilities also position the company to seize additional revenue from new Internet and data-related products that will continue to evolve over the coming

months and years.

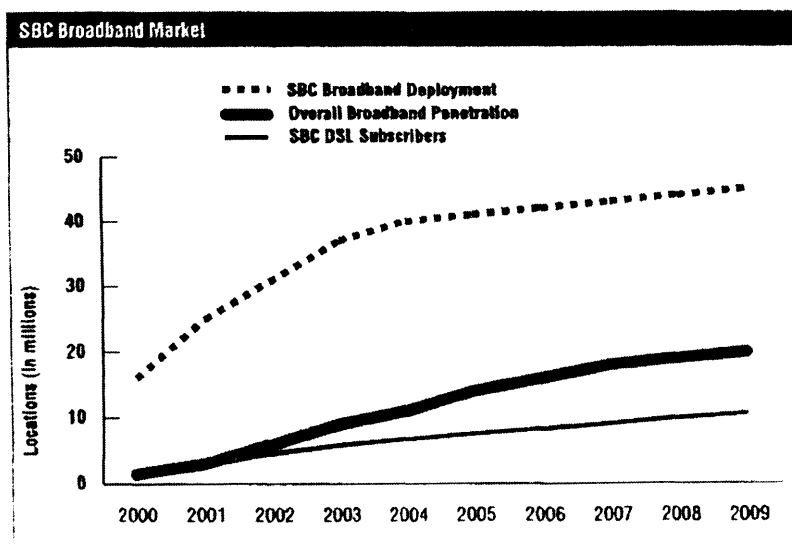
Several of the products enabled by network improvements may be substitutable for existing products, particularly in the business market. For example, voice over ADSL could reduce demand for business lines and 1.5 Mbps symmetrical service could be a substitute for T1s in certain instances.

Dynamic, data-oriented growth in the business market has fostered a migration toward higher bandwidth services — services that are often aggregated on bigger and bigger “pipes.” In the second quarter of 1999, for example, VGEs grew 16.6 percent, driven by strong demand for DS1s and DS3s.

SBC's planning is based on the expectation that business VGEs will continue to grow strongly, fueled by the movement to higher, more efficient broadband capabilities and the integration of voice and data on a single facility. The broadband deployment initiatives will expand the availability of attractive, high-speed services to customers, and improve SBC's competitive position. By having the capability in its network to efficiently offer services such as symmetrical 1.5 Mbps DSL to a much broader market, SBC is positioned to grow business revenues with attractively priced, high bandwidth, competitive products. Additionally, cost structure improvements will give SBC the flexibility to economically respond to continued changes in the marketplace.

Financial Implications

As previously described, the fixed capital required to implement these initiatives is expected to be \$6 billion. SBC plans to deploy



this capital during the next three years, with almost 75 percent targeted for spending in 2000 and 2001. With current operating cash flows in excess of \$15 billion, the company has plenty of capacity to fund this investment within its existing capital structure. SBC is evaluating whether the network initiatives will result in a write-down to the carrying value of portions of its copper network, especially the local loop. This evaluation, including quantification of any write-down, will be completed in December 1999.

Given the nature of the network deployment, related cash operating expenses should be modest, and within the parameters for merger synergy investments projected at the time of the original Ameritech acquisition announcement. These expenses include developing or modifying operational support systems; staffing, equipping and training field forces for the project; and, rolling circuits from the old network to the new. They should be about 10 percent of the capital spent per year.

The annual cost structure improvements associated with the new network architecture are targeted to reach \$1.5 billion by 2004 (\$850 million in cash operating expense and \$600 million in capital). With the network improvements paying for themselves on an NPV basis, SBC has an outstanding opportunity to create shareowner value through new revenue opportunities. SBC conservatively targets new annual revenue opportunities to exceed \$3.5 billion by 2004, most of which relates to DSL service

Asynchronous Transfer Mode (ATM)

Asynchronous Transfer Mode (ATM) is a cell-based service that provides high-speed information transfer capabilities over a wide range of bandwidths. ATM is a connection-oriented, multi-service, packet-switched technology that can be deployed either at a local level, such as private local area networks (LANs) and over wide areas as a backbone network or bridge connecting LANs to wide area networks (WANs). ATM addresses speeds ranging from 2.5 Mbps to 622 Mbps, with plans for future work on speeds up to 622 Mbps. ATM is suitable for many applications including local transport, wide area transport, voice, data, video, textual images, CAD/CAM, collaborative computing and distance learning.

ATM provides users with both scalability and flexibility. It provides scalability by allowing for various rates of access, both locally and globally, and it can be used as a base for bursty transmissions that require large amounts of bandwidth over short periods of time. ATM provides flexibility because it can support multiple services over a wide area, including frame relay. Considering these attributes, as well as its current availability, ATM is viewed as the logical next step as users migrate toward higher-capacity broadband transmission services.

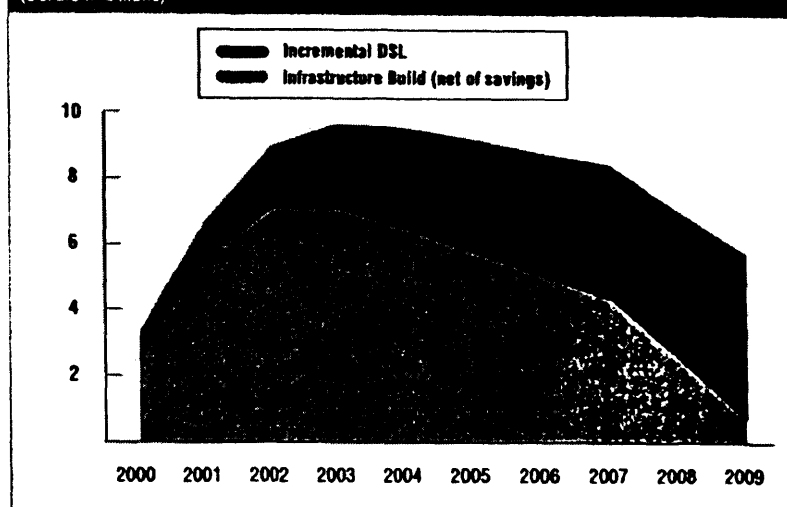
The most significant benefit of ATM is its uniform handling of services, allowing one network to meet the needs of many diverse services. ATM accomplishes this by combining the best of both circuit-switching (for constant-rate services such as voice and image) and packet-switching (for variable bit-rate services such as data and full-motion video) technologies. The result is a bandwidth guarantee, efficient switching combined with the high efficiency of packet-switching.

offerings. Revenue growth is targeted to improve 100 basis points by 2004 as a result of the expanded broadband opportunity.

SBC's planning guidelines assume a two-year payback period per DSL customer by 2004. On a per-subscriber basis, DSL products are expected to require incremental capital — for the DSLAM and equipment at the customer premise — of just under \$500. Customer acquisition costs are targeted at \$350 per subscriber. Recurring EBITDA per month is targeted at \$35. These per-subscriber metrics assume cost improvements over the next five years, as well as price reductions.

The overall earnings impact associated with DSL and other revenue opportunities from Project

Cumulative Incremental CAPX
(Dollars in billions)



Pronto is about 6 to 8 cents dilution in 2000; less than half that amount in 2001; and net-income positive by 2002.

In summary, SBC's new broadband platform and greatly expanded broadband revenue potential give SBC the opportunity to create significant shareowner value — well in excess of \$10 billion NPV. The

underlying strategic and financial rationale for these initiatives is compelling. These initiatives provide SBC with superior positioning to address exploding customer demand for high bandwidth services from every perspective — time-to-market, products, capability, technology and cost structure.

Cautionary Language Concerning Forward-Looking Statements

Information set forth in this *Investor Briefing* contains financial and consumer demand estimates, technology assessments and other forward-looking statements that

are subject to risks and uncertainties. A discussion of factors that may affect future results is contained in SBC's filings with the Securities and Exchange

Commission. SBC disclaims any obligation to update or revise statements contained in this *Investor Briefing* based on new information or otherwise.

SBC Investor Briefing

SBC Investor Briefing is published by the Investor Relations staff of SBC Communications Inc. Requests for further information may be directed to one of the Investor Relations managers by phone (210-351-3327) or fax (210-351-2071).

Written correspondence should be sent to:

Investor Relations
SBC Communications Inc.
175 East Houston, Room 8-A-60
San Antonio, Texas 78205

Internet address: <http://www.sbc.com>

Managing Director of Investor Relations
Sandy Wagner
Executive Director of Investor Relations
Gerry Chicoine
Investor Relations Staff
Melba Garcia
Blake Steward
Anne Wolfe

ATTACHMENT C

BEFORE THE
INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE INDIANA)	
UTILITY REGULATORY COMMISSION'S)	
INVESTIGATION OF MATTERS RELATED)	
TO THE FEDERAL COMMUNICATIONS)	CAUSE NO. 42500
COMMISSION'S REPORT AND ORDER)	CAUSE NO. 42500-S1
ON REMAND AND FURTHER NOTICE OF)	CAUSE NO. 42500-S2
PROPOSED RULEMAKING IN CC DOCKET)	
NOS. 01-338, 96-98, AND 98-147)	

**Covad Communications Company's
Response to The Presiding Officers' Inquiry**

Covad Communications Company ("Covad") and respectfully submits these comments in response to the Presiding Officers' inquiry as to what issues specific to the Federal Communications Commission's ("FCC's") *Triennial Review Order* remain in effect after the D.C. Circuit's decision in *USTA II*¹ and are ripe for consideration in these dockets.²

Summary

The Commission continues to have authority to require incumbent local exchange carriers ("ILECs") to provide access to the unbundled network elements ("UNEs") that the Commission addressed in the *Triennial Review Order*-related proceedings. The D.C. Circuit's decision in *USTA II* did not invalidate state commissions' review of high

¹ *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

² As understood by counsel, the Presiding Officers' inquiry at the July 8, 2004 Status Conference was as follows: What issues specific to the TRO survive the Court's mandate and should be pursued here?

capacity loops or batch cuts. Furthermore, the Commission has authority under Section 271 of the Act and state law to unbundle the UNEs in question. Accordingly, Covad and [insert other parties] respectfully urge the Commission to continue its oversight over all of the UNEs in question and to require the ILECs to provide ongoing access to those UNEs.

Comments

I. High Capacity Loops

The D.C. Circuit's decision in *USTA II* did not address (substantively or procedurally) the FCC's impairment determination and delegation with respect to high capacity loops. Specifically, the FCC's impairment determination and delegation regarding high capacity loops was not vacated when the mandate in *USTA II* issued. Therefore, CLECs have access to high capacity loops on a ubiquitous basis until and unless this Commission finds otherwise under the tests set out in the *Triennial Review Order*.

The ILECs will likely argue that the FCC's impairment determination and delegation with respect to high capacity loops should have been vacated based on the reasoning employed by the D.C. Circuit to vacate similar delegations of decision-making authority with respect to mass market switching and dedicated transport. What the ILECs argue should have happened and what actually did happen, however, are two different things. In *USTA II*, the D.C. Circuit did not vacate or even address the high capacity loop impairment determination and delegation in the *Triennial Review Order*. Unless and until the FCC changes its rules or a court of competent jurisdiction enters a decision expressly vacating those rules, the FCC's determinations and rules with respect to high

capacity loops stand, and must be carried out by this Commission. The FCC's impairment determination and delegation to state commissions with respect to high capacity loops was not vacated by *USTA II* and remains binding authority on this Commission.

II. Batch Hot Cuts

The FCC's batch hot cut rules were not part of any impairment determination delegated to the states. To the contrary, the FCC's batch hot cut rules were premised on the FCC's blanket, nationwide finding of 'impairment' with respect to mass market switching.³ Because the FCC made a "nationwide" finding of impairment based upon insufficient ILEC batch hot cut processes, it necessarily follows that the FCC did not delegate to state commissions the authority to determine whether ILEC batch hot cut processes resulted in impairment without access to mass market switching. Moreover, even if the FCC's batch hot cut rules could somehow be considered to be part of the FCC's attempted delegation to state commissions of the authority to make market-by-market impairment determinations, the batch hot cut rules themselves only required state commissions to "approve and implement a batch cut migration process" and did not require state commissions to make any impairment determinations. The FCC's batch hot cut rules were not unlawful for delegating decision-making authority to state commissions.

Furthermore, the factual information collected by the Commission in this proceeding may lawfully inform the impairment determinations that will be made by the FCC once it promulgates new unbundling rules. According to the D.C. Circuit's decision

³ See *Triennial Review Order*, ¶ 423.

in *USTA II*, the FCC is lawfully authorized to make future unbundling decisions based upon the factual information produced in state *TRO* proceedings. As stated by the D.C. Circuit, “a federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information.”⁴ The FCC is also lawfully authorized to make future unbundling decisions based upon state commission policy recommendations arising from state *TRO* proceedings. As further stated by the D.C. Circuit, “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decision itself.”⁵ The FCC should be afforded the opportunity to draw upon the factual information and policy recommendations developed therein.

Therefore, the factual information and policy recommendations produced in connection with the Commission’s batch hot cut investigation will inform both the FCC and this Commission on transitioning end-users from ILEC-switched arrangements to CLEC-switched arrangements if the FCC ultimately finds that CLECs are not impaired without access to unbundled local switching. The FCC and this Commission should be afforded the opportunity to draw upon the factual information and policy recommendations developed therein.

III. Section 271

The Bell Operating Companies (“BOCs”) have a general obligation to provide access to loops, switching, transport, and signaling under Section 271 of the Act. Specifically, in its *Triennial Review Order*, the FCC stated that “we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for

⁴ *USTA II*, 359 F.3d at 567.

⁵ *Id.* at 568.

BOCs to provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251*,”⁶ and that “we reaffirm that BOCs have an independent obligation, under Section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under Section 251 and to do so at just and reasonable rates.”⁷ The BOCs are obligated to provide CLECs with the specified network elements independent of Section 251, pursuant to Section 271, and thus the Commission has the obligation and authority to set the cost-based rate for such access pursuant to Sections 201 and 202 of the Communications Act. This is an appropriate docket to address those issues.⁸

Conclusion

Covad respectfully urges the Commission to continue its oversight in this proceeding over all of the UNEs addressed in the *Triennial Review Order* and to require the ILECs to provide ongoing access to those UNEs, and further urges the Commission to specifically consider the issues identified above as outside the Court’s mandate in *USTA II*.

⁶ *Triennial Review Order*, ¶ 652. For example, the FCC has consistently and repeatedly held that Checklist Item No. 4—which requires the BOC applicant to provide access to the “local loop transmission from the central office to the customer’s premises, *unbundled from local switching or other services*”—requires BOC 271 applicants to provide non-discriminatory access to shared loops, that is, the high frequency portion of the loop (“HFPL”).

⁷ *Triennial Review Order*, ¶ 652.

⁸ Covad understands that the Commission intends to look at other issues outside the TRO in Cause No. 42689, as initiated on July 21, 2004.

Respectfully submitted,

Covad Communications Company

COVAD COMMUNICATIONS COMPANY
100 Congress Avenue, Suite 2000
Austin, Texas 78701
(512) 469-3781
(512) 469-3783

By its Counsel:

Robert K. Johnson
Attorney No. 5045-49
Attorney at Law
350 Canal Walk
Indianapolis, Indiana 46202
(317) 506.7348

Certificate of Service

A copy of the foregoing has been served on all persons listed on the Commission's official service list in this cause this 29th day of July, 2004.

Robert K. Johnson
Attorney No. 5045-49

ATTACHMENT D

CLEC COALITION
August 10, 2004

DOCKET NO. 28821

RECEIVED
2004 AUG 10 AM 11:48
PUBLIC UTILITY COMMISSION
FILING CLERK

ARBITRATION OF NON-COSTING	§	PUBLIC UTILITY COMMISSION
ISSUES FOR SUCCESSOR	§	
AGREEMENTS TO THE TEXAS 271	§	OF TEXAS
AGREEMENT	§	

**JOINT CLECS' INITIAL BRIEF ON COMMISSION'S
AUTHORITY TO ARBITRATE TERMS AND CONDITIONS OF
SECTION 271 UNBUNDLED NETWORK ELEMENTS**

COMES NOW the CLEC Coalition,¹ AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc., Birch Telecom of Texas, Ltd., LP and ionex Communications South, Inc. ("Joint CLECs") and jointly file this Brief in response to the Commission's Order No. 22 directing the filing of briefs on the following question:

What is the Commission's authority to arbitrate the terms and conditions of unbundled network elements that have been "declassified" but are still required to be provided under FTA § 271?

I. THE QUESTION BEFORE THE COMMISSION

SBC-Texas ("SBC") has contended in three separate motions and briefs that the Commission has no authority to arbitrate the DPL issues that in any way touch upon or involve network elements no longer required to be unbundled under § 251 of the FTA, but which SBC must make available under § 271. The Commission rejected SBC's view. Now, on reconsideration, the Commission has asked for briefing on the extent of its arbitration authority with respect to § 271 network elements. The question posed to the

¹ AMA Communications, L.L.C. dba AMA*Techtel Communications, Cbeyond Communications of Texas, L.P., ICG Telecom Group, Inc., KMC Telecom, Inc., McLeodUSA Telecommunications Services, Inc., nii Communications, Ltd., NTS Communications, Inc., Time Warner Telecom of Texas, L.P., Xspedius Communications, LLC, and XO Texas, Inc. KMC Telecom, Inc. participates on behalf of its certificated entities, KMC Telecom III LLC, KMC Data LLC, and KMC Telecom V, Inc., d/b/a KMC Network Services, Inc.

state commissions are expected to play in ensuring compliance with § 271 standards after a BOC has been granted interLATA entry. The Commission has full authority to arbitrate all of the issues set out in the parties' DPLs involving CLECs access to and use of network elements SBC is required to provide under § 271 of the Act.

II. THE FTA GIVES STATE COMMISSIONS THE AUTHORITY AND RESPONSIBILITY TO ARBITRATE DISPUTES REGARDING § 271 NETWORK ELEMENTS

While SBC has acknowledged that it must offer each of the elements listed in the § 271 checklist, it contends that the PUC lacks authority to resolve disputes as to the terms and conditions under which these network elements will be provided. The FTA, however, is clear on this point – each § 271 network element must be offered through interconnection agreements that are subject to the § 252 state commission review process. Section 271(c)(2)(A) clearly links a BOC's duty to satisfy its obligations under the competitive checklist to its providing that access through an interconnection agreement (or SGAT):

(A) AGREEMENT REQUIRED – A Bell operating company meets the requirements of this paragraph if, within the State for which authorization is sought –

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and

(ii) such access and interconnection meets the requirements of subparagraph (B) [the competitive checklist].

These interconnection agreements are subject to the § 252 arbitration and review process. Section 271 unambiguously requires that the interconnection agreements which contain checklist items must be approved under section 252 of the Act.

§ 271(c)(1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection

vested jurisdiction with the FCC to evaluate a BOC's application for in-region interLATA authority as well as to review complaints brought under section 271(d)(6) regarding ongoing compliance with § 271 obligations, in consultation with the state commission. Assigning authority to the FCC to evaluate a BOC's continuing compliance with § 271 in no way strips the states of their authority to review rates, terms, and conditions for network elements set forth in interconnection agreements.

State commissions that have recently analyzed the same jurisdictional question posed by this Commission have concluded that they have jurisdiction over the terms and conditions of § 271 network elements. On June 21, 2004, the Tennessee Regulatory Authority unanimously voted to open a generic docket to set industry-wide rates for § 271 unbundled switching, and it approved a rate for § 271 switching in an arbitration involving BellSouth and ITC^Deltacom.⁸ On July 23, 2004, a hearing examiner in a Maine Public Utilities Commission proceeding issued a ruling finding that Verizon must file a wholesale tariff setting forth the rates, terms, and conditions of its §271 network elements.⁹ BellSouth has responded to the Tennessee order by filing a petition urging the FCC to pre-empt state authority over § 271,¹⁰ just as SBC asked the FCC to pre-empt this Commission's assertion of § 252 authority in Docket No. 29644.¹¹ The FCC has not ruled on the BellSouth pre-emption petition.

⁸ Tennessee Regulatory Authority Docket No. 03-00119. The TRA decision is not yet reflected in a written order.

⁹ Maine Public Utilities Commission, Docket No. 2002-682, Examiner's Report (July 23, 2004). In Maine, one of Verizon's § 271 commitments was to file a wholesale services tariff for all network elements. The Examiner held: "[T]he FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements." *Id.* at 16. (This decision is attached as Exhibit 1 to this brief).

¹⁰ See FCC Docket WC Docket No. 04-245 *Emergency Petition for Declaratory Ruling and Preemption of State Action*, filed by BellSouth on July 1, 2004. The Petition seeks an Order from the FCC preempting the June 21, 2004 decision of the TRA.

¹¹ *Joint CLEC Petition For A Ruling Relative To The Need for Public Review and Approval By The Commission of the April 3, 2004 Telecommunications Services Agreement Between SBC-Texas and Sage Telecom*, Docket No. 29644, SBC Texas' Response to the Joint CLEC Petition (May 6, 2004). The pre-emption petition is attached to the SBC Response at Attachment 2.

standard of review that a state should apply in evaluating a BOC's rates for declassified network elements.¹⁵

By adopting the "just, reasonable and not unreasonably discriminatory" pricing standard the FCC did not modify the division of responsibilities set forth in the Act. The FTA preserved the traditional jurisdictional separation between interstate and intrastate services, with the FCC having primary responsibility for interstate services, while the states regulate intrastate services. The FTA provides that the FCC may define, through rulemaking, a general rate setting methodology for network elements. In this instance, the FCC adopted a just and reasonable standard. It is the states' responsibility, however, to establish the actual rates, terms, and conditions that will be charged by the BOCs. In *Iowa Utilities Board v. AT&T*, the Supreme Court affirmed this division of responsibility, stating that

[section] 252(c)(2) entrusts the task of establishing rates to the state commissions...The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.¹⁶

A shift in the pricing standard from TELRIC to "just and reasonable" does not require or permit a shift in the regulatory body the FTA has mandated be responsible for applying the standard.

BOCs are obligated by § 271 to provide certain network elements in their interconnection agreements approved under § 252. The responsibility for resolving disputed issues regarding those network elements resides with this Commission pursuant to § 252. The FCC did not alter that division of responsibilities in the TRO.

¹⁵ In fact, as illustrated above, the FCC emphasized that sections 201 and 202 of the Act apply to *interstate* – not intrastate communications. The FCC did *not* conclude that sections 201 and 202 in any way grant it jurisdiction over network elements made available under § 271. As a practical matter, network elements are predominantly used to provide intrastate services. As a result, sections 201 and 202 almost never would govern rates if the traditional separation of regulatory jurisdiction applied.

¹⁶ *Iowa Utilities Board v. AT&T*, 525 U.S. 366, 384 (1999).

The notion that a state commission's authority to establish the terms and conditions of § 271 access somehow disappears upon § 271 approval from the FCC is further belied by the FCC's own previous recognition of state commission authority to enforce the terms of post-approval § 271 access. While noting that Congress authorized the FCC to enforce § 271 to ensure continued checklist compliance, the FCC's 271 Orders have always specifically endorsed state commission authority to enforce commitments made by BOCs. For example, in the *Texas 271* Order applicable to SBC (then SWBT), the FCC stated that:

Section 271 approval is not the end of the road for SWBT in Texas. The statutory regime makes clear that SWBT must continue to satisfy the "conditions required for ... approval" after it begins competing for long distance business in Texas.

....
Working in concert with the Texas Commission, we intend to monitor closely SWBT's post-approval compliance. . . . We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT's entry into the Texas long distance market.¹⁹

Every subsequent FCC Order granting BOC long distance entry reached the same conclusion: state commissions are fully empowered to ensure BOC compliance with the checklist after § 271 approval.

Indeed, as recently as the FCC's very last 271 order for Arizona, the FCC made clear that continuing state commission authority to enforce BOC compliance with the requirements of § 271 extended beyond the date of FCC approval. Indeed, in determining to grant Qwest's application, the FCC relied explicitly on the ongoing enforcement authority of state commissions post-approval, under either federal or state law:

We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long distance market. These mechanisms are administered by the state commissions and derive from authority the states have under state law or under the federal Act. As such,

¹⁹ *Texas 271 Order* ¶¶434-436 (emphasis supplied).

Respectfully submitted,
CASEY, GENTZ & MAGNESS, L.L.P.

By: Bill Magness
Bill Magness
State Bar No. 12824020
Susan C. Gentz
State Bar No. 07803500
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701-4286
512-480-9900
412-480-9200 (FAX)

ATTORNEYS FOR THE CLEC COALITION

AT&T COMMUNICATIONS OF
TEXAS, L.P.

By: Bill Magness For
Michelle Skane Bourianoff
State Bar No. 02925400
Kevin K. Zarling
State Bar No. 22249300
919 Congress Avenue, Suite 900
Austin, Texas 78701-2444
512-370-1083
512-370-2096 (FAX)

ATTORNEYS FOR AT&T
COMMUNICATIONS OF TEXAS,
L.P., TCG DALLAS, and TELEPORT
COMMUNICATIONS HOUSTON,
INC.

EXHIBIT 1

interconnection agreements that were unrelated to the terms that they were interested in negotiating.¹ Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial Case Conference for December 10th. On December 4, 2002, prior to the Case Conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it² and proposing a schedule for processing this case. Between December

¹ *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.*

² The parties include: OPA, ASCENT, WorldCom, Mid-Maine Telecommunications, and Oxford Networks. Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the TRO. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the TRO would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing unbundled network elements (UNEs) under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial briefs were filed by Verizon-Maine (Verizon), the CLEC Coalition, and the Consolidated Intervenors (Biddeford Internet Company d/b/a Great Works Internet (GWI), the Office of the Public Advocate (OPA) and Cornerstone

respects⁶) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.⁷ Thus, Checklist Item No. 2 requires an ILEC to meet

⁶In a recent order in the *Skowhegan Online Proceeding*, we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

⁷In the *TRO*, the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a

(emphasis added). The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order*, for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.¹¹

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order's* citation to the *New York 271 Order*, which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the *New York 271 Order* specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.¹²

¹¹ *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order*).

¹² *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order*) at ¶ 452.

The MPUC finds, based upon the record before us, including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.¹⁵

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our Report to the FCC that:

Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.¹⁶

¹⁵Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

¹⁶271 Report to FCC at p. 7.

Supplemental Brief, Verizon states that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

2. Consolidated Intervenor.

In their initial brief, the Consolidated Intervenor state that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cites paragraphs 653 and 655 of the *TRO*. They also point to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenor urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They point to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review as evidence of the Commission's authority. They assert that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenor state that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpret the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

First, with regard to the scope of Verizon's commitment to file a wholesale tariff in Maine, we examine the underlying purposes of the condition and find that the same reasons for requiring a wholesale tariff encompassing Verizon's 251 obligations apply equally to Verizon's 271 obligations. Indeed, they apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may come up in an interconnection agreement negotiation. In the Verizon Arbitration proceeding,¹⁷ CLECs complained that Verizon has not responded to requests from CLECs to negotiate amendments to their interconnection agreements. These are the same types of complaints we heard during the 271 process which led us to adopt the wholesale tariff condition in this first place. Finally, Verizon has not argued to us that it did not commit to tariff all of its wholesale obligations. Instead, it focuses on the jurisdictional issues without examining the motivations and intentions behind its 271 commitment. We find that a reasonable interpretation of the condition we placed upon Verizon, and the condition it committed to fulfill, requires Verizon to include both its 251 and 271 unbundling obligations in its wholesale tariff filed in Maine.

We turn now to our authority to enforce that commitment. While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon fails to explain adequately why states have authority over some 271 issues, such as performance assurance plans, and not others. Previously, state commissions did not have authority to approve an ILEC's 271

¹⁷*Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

As indicated above, the FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements. If a party believes the Commission has not applied the correct standard, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II*.

In addition to the legal basis for our decision, our decision also addresses a significant practical consideration facing the Commission. Specifically, from a Commission resource perspective, it makes much more sense to litigate all of the issues associated with unbundling in one docket and develop a standard offer or Statement of Generally Available Terms (SGAT). A single litigated case ensures that we receive the benefit of briefing on an issue from all interested parties, rather than rely on individual litigants to brief issues that may, or may not, be important to them. Individual litigation diverts Commission resources from addressing matters that impact all carriers to issues that may only affect one or two carriers.

Finally, we note that 35-A M.R.S.A. § 304 requires that all utilities file schedules containing the rates, terms, and conditions for any service performed by it within the State. We have previously interpreted this provision to require filing of

Supreme Court¹⁸) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."¹⁹ Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.²⁰ The FCC noted

¹⁸See *AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II*).

¹⁹*TRO* at ¶ 656.

²⁰*TRO* at ¶ 664.

arbitration proceeding.²⁴ Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon.

Verizon argues that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contends that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. Verizon argues that the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also points out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

2. CLECs.

The CLEC Coalition argues that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs over which the Commission would have the authority to review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because

²⁴ *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-___ (July 1, 2004) at 1.

Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the TRO, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*²⁶ clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

[Section] 252(c)(2) entrusts the task of establishing rates to the state commissions The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.²⁷

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct as another source of authority to set rates for elements provided pursuant to section 271.

Notwithstanding these arguments in favor of Commission authority to set 271 UNE rates, we decline at this time to exercise that authority. While we do not necessarily agree with the FCC's assertion of exclusive jurisdiction over 271 UNE rates, it is, nonetheless, the current law of the land. Rather than add an additional layer of confusion to an already complex situation, we will allow time for the process envisioned by the FCC to work, i.e., for Verizon to file federal tariffs or for the parties to reach arms-length agreements. While we will not set the rates charged by Verizon, we will exercise our authority to require Verizon to file those rates with us in its wholesale tariff. Indeed, before Verizon may begin charging any CLEC 271 UNE rates which are higher than its current TELRIC rates, Verizon must first obtain the FCC's approval for the specific rates

²⁶*Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

²⁷*Iowa II*, 525 U.S. at 384.

economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.²⁹ While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

[E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.

USTA II at 45. Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.

Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs. In its *Line Sharing Order*,³⁰ the FCC discussed the necessity of unbundling the HFPL as part of an ILEC's 251 unbundling obligations. In its *Oklahoma/Kansas 271 Order*, the first 271 Order issued after the *Line Sharing Order*,

²⁹*TRO* at ¶ 258.

³⁰*Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

Verizon contends that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon. This is especially true where the FCC has explicitly declared that line sharing is not required. Verizon points out that the FCC authorized the state to perform "granular" review of specific elements only and that line sharing was not one of them.

Verizon further argues that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argues that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputes the CLECs' claim that the Commission has separate state authority to order line sharing and states that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refutes the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts. Since the FCC has already found no impairment, they conclude, the Commission is not free to order line sharing.

In its Supplemental Brief, Verizon asserts that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.³³ Verizon also repeats its belief that

³³*USTA II* at 12.

In their Reply Brief, the Consolidated Intervenors again describe how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cite to paragraph 650 of the *TRO* where the FCC states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." The Consolidated Intervenors implore the Commission to enforce Verizon's 271 obligations.

In their Supplemental Brief, the Consolidated Intervenors state that the decision in *USTA II* confirms the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argue that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

C. Decision

We find, based upon the language quoted above from the FCC's *Massachusetts 271 Order*, that Verizon must continue to provide CLECs with access to line sharing in order comply with Checklist Item No. 4 of section 271. As discussed above, however, we will not exercise any authority we might have to set rates for 271-based UNEs such as line sharing and will leave those issues to the FCC, which has already stated what it believes to be the fair rate, i.e. three years of transition rates leading to up to the full cost of the loop. While our decision today does not provide the CLECs with all of the relief they requested, it does provide them with the continued

clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."³⁸ Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.³⁹

The FCC's assertion that its rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in *Iowa I.*⁴⁰ The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.⁴¹ It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."⁴² While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eighth Circuit's holding on section 251(d)(3).⁴³ Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it

³⁸*Id.*

³⁹*Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

⁴⁰See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds*, *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

⁴¹*Id.* at 806.

⁴²*Id.* It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id.* at 807.

⁴³See *TRO* at ¶ 192, fn. 611.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs in its state wholesale tariff and to continue to offer line sharing pursuant to Checklist Item No. 4 of section 271.

Respectfully submitted,

Trina M. Bragdon
Hearing Examiner

45